

§ 401.30

(e) At a hearing, the Governments and persons interested are entitled to present, in person or by counsel, oral and documentary evidence and argument that is relevant and material to any matter that is within the published purpose of the hearing.

(f) The presiding chairman may require that evidence be under oath.

(g) Witnesses may be examined and cross-examined by the Commissioners and by counsel for the Governments and the Commission. With the consent of presiding chairman, counsel for any interested person may also examine or cross-examine witnesses.

(h) The Commission may require further evidence to be given and may require printed briefs to be submitted at or subsequent to the hearing.

22 CFR Ch. IV (4–1–05 Edition)

(i) A verbatim transcript of the proceedings at the hearing shall be prepared.

§ 401.30 Proceedings under Article X.

When a question or matter of difference arising between the two Governments involving the rights, obligations or interests of either in relation to the other or to their respective inhabitants has been or is to be referred to the Commission for decision under Article X of the Treaty, the Commission, after consultation with the said Governments, will adopt such rules of procedure as may be appropriate to the question or matter referred or to be referred.

CHAPTER V—BROADCASTING BOARD OF GOVERNORS

EDITORIAL NOTE: Nomenclature changes to Chapter V appear at 64 FR 54539, Oct. 7, 1999.

<i>Part</i>		<i>Page</i>
501	Appointment of Foreign Service officers	101
503	Freedom of Information Act regulation	108
505	Privacy Act regulation	121
506	Part-time career employment program	127
507	Rules for implementing open meetings under the Sunshine Act for the Broadcasting Board of Gov- ernors	128
510	Service of process	131
511	Federal tort claims procedure	131
512	Collection of debts under the Debt Collection Act of 1982	133
513	Government debarment and suspension (non- procurement) and governmentwide requirements for drug-free workplace (grants)	144
518	Uniform administrative requirements for grants and agreements with institutions of higher edu- cation, hospitals, and other non-profit organiza- tions	163
519	New restrictions on lobbying	189
521	Implementation of the Program Fraud Civil Rem- edies Act	200
530	Enforcement of nondiscrimination on the basis of handicap in programs or activities conducted by the Broadcasting Board of Governors	216

PART 501—APPOINTMENT OF FOREIGN SERVICE OFFICERS

Sec.

501.1 Policy.

501.2 Eligibility for appointment as Foreign Service Officer.

501.3 Noncompetitive interchange between Civil Service and Foreign Service.

501.4 Junior Level Career Candidate Program (Class 6, 5, or 4).

501.5 Mid-Level FSO Candidate Program (Class 3, 2, or 1).

501.6 Appointment of Overseas Specialists.

501.7 Appointment as Chief of Mission.

501.8 Reappointment of Foreign Service Officers and Career Overseas Specialists.

501.9 Interchange of FSOs between Broadcasting Board of Governors and other Foreign Affairs Agencies.

AUTHORITY: Foreign Service Act of 1980 (22 U.S.C. 3901 et seq.).

SOURCE: 50 FR 27423, July 3, 1985, unless otherwise noted.

§501.1 Policy.

It is the policy of the Broadcasting Board of Governors that Foreign Service Officers occupy positions in which there is a need and reasonable opportunity for interchangeability of personnel between the Board and posts abroad, and which are concerned with (a) the conduct, observation, or analysis of information and cultural activities, or (b) the executive management of, or administrative responsibility for, the overseas operations of the Board's program.

§501.2 Eligibility for appointment as Foreign Service Officer.

CROSS-REFERENCE: The regulations governing eligibility for appointment as a Foreign Service Officer are codified in part 11 of this title.

§501.3 Noncompetitive interchange between Civil Service and Foreign Service.

(a) An agreement between the Office of Personnel Management and the Board under the provisions of Executive Order 11219 (3 CFR 1964-65 Comp. p. 303) provides for the noncompetitive appointment of present or former Foreign Service employees as career or career conditional Civil Service employees.

(b) Under this agreement former career personnel of the Board's Foreign Service (FSCR, FSRU, FSIO, FSS, FSO, or FP) and such present personnel desiring to transfer, are eligible, under certain conditions, for noncompetitive career or career-conditional appointment in any Federal agency that desires to appoint them. The President has authorized the Office of Personnel Management by executive order to waive the requirements for competitive examination and appointment for such Board career Foreign Service personnel.

(c) A present or former Civil Service employee may be appointed on a competitive basis in any Foreign Service class for which the employee has qualified under the provisions of section 3947 of title 22, United States Code.

§501.4 Junior Level Career Candidate Program (Class 6, 5, or 4).

CROSS-REFERENCE: The regulations governing the junior level Career Candidate program are codified in part 11 of this title.

§501.5 Mid-level FSO Candidate Program (Class 3, 2, or 1).

(a) *General.* The mid-level FSO Candidate program, under the provisions of section 306 of the Foreign Service Act of 1980, supplements the junior-level Career Candidate program to meet total requirements for Foreign Service Officers at the mid-level in the Foreign Service. Foreign Service limited appointments of FSO Candidates are made to Class 3, 2, or 1 for a period not to exceed five years. Occasionally, appointments may be offered at the Class 4 level. The FSO Commissioning Board will determine whether FSO Candidates have performed at a satisfactory level and demonstrated the required level of growth potential and competence, and will make a recommendation on commissioning as Foreign Service Officers. FSO Candidates who are not recommended for commissioning prior to the expiration of their limited appointment will be separated from the mid-level program.

(b) *Sources of applicants.* (1) The Broadcasting Board of Governors draws a significant number of FSO Candidates from Board employees who

apply, and are found qualified by the Board of Examiners for the Foreign Service (BEX).

(2) The Board also draws Candidates from outside applicants who possess skills and abilities in short supply in the Foreign Service and who have capabilities, insights, techniques, experiences, and differences of outlook which would serve to enrich the Foreign Service and enable them to perform effectively in assignments both abroad and in the United States. Minority applicants are recruited for mid-level entry under the COMRAT program. Appointment from sources outside the Board is limited and based on intake levels established in accordance with total Broadcasting Board of Governors FSO workforce and functional requirements. Such appointments are based on successful completion of the examination process, and existing assignment vacancies.

(c) *Eligibility requirement.* (1) *Broadcasting Board of Governors Employees.* On the date of application, employees must have at least three years of Federal Government service in a position of responsibility in the Board. A position of responsibility is defined as service as an Overseas Specialist at Class 4 or above or as a Domestic Specialist at GS-11 or above within the Board. The duties and responsibilities of the position occupied by the applicant must have been similar or closely related to those of a Foreign Service Officer in terms of knowledge, skills, abilities, and overseas experience. Board Domestic and Overseas Specialists must be no more than 58 years of age on the date of redesignation or appointment as an FSO Candidate.

(2) *Applicants Under Special Recruitment Programs.* Minority and women applicants must be no more than 58 years of age, must have approximately nine years of education or experience relevant to work performed in Broadcasting Board of Governors, must be knowledgeable in the social, political and cultural history of the U.S. and be able to analyze and interpret this in relation to U.S. Government policy and American life.

(3) *Outside Applicants.* On the date of appointment, applicants must be no more than 58 years of age, with nine

years of relevant work experience and/or education, or proficiency in a language for which the Board has a need, or substantial management expertise. Relevant work experience is defined as public relations work, supervisory or managerial positions in communications media, program director for a museum or university-level teacher of political science, history, English or other relevant disciplines. Appointments from these sources for the limited vacancies available are made on a competitive basis to fill specific Service needs after ensuring that the vacancies cannot be filled by Foreign Service Officers already in the Foreign Service Officer Corps.

(d) *Application Procedures.* (1) Applicants must complete Standard Form 171, Application for Federal Employment; Form DSP-34, Supplement to Application for Federal Employment; a 1,000 word autobiography; a statement affirming willingness and capacity to serve at any post worldwide; and transcripts of all graduate and undergraduate course work and forward them to the Special Recruitment Branch, Office of Personnel (M/PDSE).

(2) The filing of an application for the Foreign Service does not in itself entitle an applicant to examination. The decision to proceed with an oral examination is made by a Qualifications Evaluation Panel after determining the applicant's eligibility for appointment and reviewing the applicant's qualifications including his/her performance, and administrative files (or equivalents), claimed language proficiency and other background or factors which may be related to the work performed by FSOs. An oral examination is given only in those cases where the applicant is found to possess superior qualifications, proven ability, and high potential for success in the Foreign Service.

(e) *Examination process.* (1) *Written Examination.* A written examination will not normally be required of applicants for FSO Candidate appointments. However, if the volume of applications for a given class or classes is such as to make it infeasible to examine applicants orally within a reasonable time, such applicants may be required to

take an appropriate written examination prescribed by the Board of Examiners. Those who meet or exceed the passing level set by the Board of Examiners on the written examination will be eligible for selection for the oral examination.

(2) *Oral examination.* (i) Applicants approved by the Qualifications Evaluation Panel for examination will be given an oral examination by a panel of Deputy Examiners approved by the Board of Examiners. The oral examination is designed to enable the Board of Examiners to determine whether applicants are functionally qualified for work in the Foreign Service at the mid-level, whether they would be suitable representatives abroad of the United States, whether they have the potential to advance in the Foreign Service, and whether they have the background and experience to make a contribution to the Foreign Service. The oral examination is individually scheduled throughout the year and is normally given in Washington, D.C. At the discretion of the Board of Examiners, it may be given in other American cities, or at Foreign Service posts, selected by the Board.

(ii) The panel will orally examine each applicant through questioning and discussion. There will also be a writing exercise and an in-basket test. Applicants taking the oral examination will be graded according to the standards established by the Board of Examiners. The application of anyone whose score is at or above the passing level set by the Board will be continued. The application of anyone whose score is below the passing level will be terminated. The applicant may, however, reapply in 12 months by submitting a new application.

(3) *Foreign language requirement.* All applicants who pass the oral examination will be required to take a subsequent test to measure their fluency in foreign languages, or their aptitude for learning them (MLAT) for which a score of 50 points (on a scale of zero to eighty) is necessary to qualify for further processing. No applicant will be recommended for career appointment who has not demonstrated such a proficiency or aptitude. An applicant may be selected, appointed and assigned

without first having demonstrated required proficiency in a foreign language, but the appointment will be subject to the condition that the employee may not receive more than one promotion and may not be commissioned as an FSO until proficiency in one foreign language is achieved.

(4) *Medical examination.* Those applicants recommended by the Board of Examiners for an FSO candidacy, and their dependents who will reside with them overseas, are required to pass a physical examination at the Department of State Medical Division.

(5) *Security and suitability considerations.* A background investigation or appropriate security clearance update will be conducted on each applicant, and no application may be continued until a security clearance has been granted.

(6) *Class of appointment.* The Board of Examiners fixes the entry level for appointment as an FSO candidate.

(7) *Certification for appointment.* After completion of all aspects of the examination, the Board of Examiners certifies to the Board successful candidates for appointment as FSO Candidates. Determinations of duly constituted panels of examiners and deputy examiners are final, unless modified by specific action of the Board of Examiners for the Foreign Service.

(8) *FSO Candidate registers.* (i) After approval by the Board of Examiners, and certification as to suitability and security clearance by the Board's Director of Security, successful applicants will have their names placed on a register for the class for which they have been found qualified. Appointments to available openings will be made from the applicants entered on the register for the class of the position to be filled. Inclusion on the register does not guarantee eventual assignment and appointment as an FSO Candidate. Applicants who have qualified but have not been appointed because of lack of openings will be dropped from the register 18 months after the date of placement on it (or the completion of an inside applicant's current overseas tour, whichever is longer). Such applicants may reapply for the program, but will be required to

§ 501.6

22 CFR Ch. V (4-1-05 Edition)

repeat the entire application process, including BEX testing.

(ii) Any applicant on the register who refuses an assignment offer will be removed from the Register and will not be eligible to reapply for the program for seven years.

(iii) The Board of Examiners may extend the eligibility period when such extension is in its judgment justified in the interest of the Foreign Service.

(f) *Appointment as an FSO Candidate.*

(1) An FSO Candidate will be given a four-year Foreign Service limited appointment. Board Career Overseas Specialists will be redesignated as FSO Candidates for a period of four years. The appointment or redesignation may be extended for one year, but must be terminated at the end of the fifth year. The purpose of the FSO Candidacy is to permit on-the-job evaluation of an individual's suitability and capacity for effective service as a Foreign Service Officer.

(2) FSO Candidates will be assigned to Generalist positions overseas, and will compete for promotion with other Generalist officers under the Annual Generalist Selection Boards. FSO Candidates at the Class 1 level may not compete for promotion into the Senior Foreign Service prior to commissioning as an FSO.

(3) The FSO Candidacy may be terminated during the four-year period for unsatisfactory performance (22 U.S.C. 4011) or for such other cause as will promote the efficiency of the Service (22 U.S.C. 4010).

(g) *Commissioning as a Foreign Service Officer.* (1) Upon completion of three years' service (most of which will have been overseas), the FSO Candidate will be eligible for commissioning as a Foreign Service Officer. The FSO Commissioning Board will review all FSO Candidates appointed on or after March 1, 1980 and will recommend on tenure.

(2) The criterion used for deciding whether to recommend commissioning of FSO Candidates is the Candidate's demonstrated potential to perform effectively as a Foreign Service Officer in a normal range of generalist assignments up through the Class 1 level. No quota or numerical limit is placed on the number of affirmative decisions.

(3) If recommended for commissioning, and having satisfied the language proficiency requirements, the name of the FSO Candidate will be forwarded to the President and the Senate and, upon approval, the FSO Candidate will be commissioned as an FSO.

(4) If the FSO Commissioning Board does not recommend commissioning of the FSO Candidate during its review, it may recommend extension of the FSO Candidacy to allow for a future review. Under no circumstances will an FSO Candidacy be extended to a total of more than five years.

(5) Candidates not recommended for commissioning or who have not satisfied the language proficiency requirement will be separated from the Service at the expiration of their appointment. However, FSO Candidates who were appointed from within the Board with career status as a Domestic or Overseas Specialist may exercise re-appointment rights to their previous category in lieu of separation.

§ 501.6 Appointment of Overseas Specialists.

(a) *General.* Members of the Board's Foreign Service appointed as Overseas Specialists serve on rotational U.S.-overseas assignments in the following types of positions: General Administration; Publication Writers and Editors; Exhibit Managers; Printing Specialists; English Teaching Specialists; Correspondents; Engineers for the Voice of America; Regional Librarian Consultants; and Secretaries. Appointees serve a trial period of service as Specialist Candidates under Foreign Service limited appointments (or redesignation) for a period not to exceed five years. Appointments are made to F.S. classes 8 through 1. Specialist Candidates are given career appointments as Overseas Specialists based on the recommendations of Specialist Selection Boards. Specialist candidates not recommended for tenuring will be separated from the Foreign Service, or reinstated in the Civil Service.

(b) *Sources of applicants.* Qualified Broadcasting Board of Governors domestic employees comprise a significant recruitment source for Overseas Specialist appointments. Such employees will be given priority consideration

Broadcasting Board of Governors

§ 501.6

over outside applicants when applying for Overseas Specialist positions, when qualifications are otherwise equal.

(c) *Eligibility requirements.* All applicant must be citizens of the United States, and must be at least 21 years of age and no more than 58 years of age at the time of appointment. The 21-year age requirement may be waived by the Director, Office of Personnel (M/P or VOA/P) when she or he determines that the applicant's services are urgently needed. Broadcasting Board of Governors employee applicants must also have at least three years of Federal government experience and occupy a position at the GS-11 level (or equivalent) or above (GS-10 for Electronic Technicians in the Voice of America). All applicants must be available for worldwide assignment to positions in their occupational category.

(d) *Application procedures.* (1) Applications for all specialties except secretarial should include a current SF-171, Application for Federal Employment; a DSP-34, Supplement to Application for Federal Employment; university transcripts; a 1,000 word autobiographical statement which should include mention of the qualifications the applicant would bring to the job and reason for desiring to work for the Board; and a statement affirming willingness and capacity to serve at any post worldwide.

(2) *Special requirements for Foreign Service Secretaries.* Secretarial applicants must submit a current SF-171, Application for Federal Employment, and a 250 word essay on a commonly understood subject to demonstrate grammatical competence. The following specific requirements must be met by applicants: Ability to type accurately at 60 words per minute; four years of secretarial or administrative experience (business school or college training may be substituted for up to two years of required work experience); and attainment of an acceptable score in verbal ability and spelling tests. Applicants will subsequently be given a written examination to measure administrative aptitude.

(e) *Examination process—(1) Application review.* All applications are to be sent to the Special Recruitment Staff, Office of Personnel (M/PDSE), or to the

Foreign Personnel Advisor (VOA/PF) for Voice of America positions.

(2) *Qualifications Evaluation Panel.* A Qualifications Evaluation Panel will evaluate the applicant's qualifications including his/her performance and administrative files (or equivalent), claimed language proficiency and other background or factors which may be related to the work performed by an Overseas Specialist Officer in the relevant specialty.

(3) *Oral examination.* (i) Applicants who are passed on by the Qualifications Evaluation Panel to the Board of Examiners will be given an oral examination to evaluate the applicant's total qualifications for service as an Overseas Specialist in the desired functional specialty.

(ii) The Board panel examining all candidates except those of the Voice of America will consist of one Broadcasting Board of Governors Overseas Specialist and two BEX Deputy Examiners. For VOA candidates, the panel will consist of the Foreign Personnel Advisor, a BEX Deputy Examiner assigned to the Voice of America, and a Deputy Examiner assigned to the Board of Examiners.

(iii) The panel will examine each applicant through questioning and discussion. Hypothetical problem-solving exercises, a writing exercise and an in-basket test may also be required. The panel will also recommend the F.S. entry level for appointment. If the panel's recommendation is unfavorable, the application process will be discontinued. An unsuccessful applicant may apply again in 12 months.

(4) The same medical and security requirements applicable to FSO Candidates pertain to Specialist Candidates.

(5) *Overseas Specialist Candidate register.* If an applicant is successful in the examination, and medical and security clearances have been successfully completed, his/her name will be added to the appropriate Overseas Specialist register for a period of 18 months, or completion of an inside candidate's current tour of duty overseas, whichever is longer, at the Foreign Service class determined in the examination process and based on previous experience. Inclusion on the register does not

guarantee eventual assignment and appointment as an Overseas Specialist Candidate.

(f) *Appointment as a Specialist Candidate.* (1) When the Office of Personnel identifies an overseas vacancy which cannot be filled from the existing ranks of Overseas Specialists, applicants on the Overseas Specialist register will be considered for the assignment. An applicant will not be appointed unless an overseas position has been identified and a need for the individual in the Foreign Service has been certified by the Director, Office of Personnel (M/P or VOA/P). Any applicant selected from the register who refuses an assignment offer will be dropped from the register and precluded from reapplying for a period of seven years.

(2) Applicants will be given a Foreign Service limited appointment (or redesignation) for a period of four years at the Foreign Service Class determined in the examination process. The purpose of this untenured appointment is to allow the Board to evaluate and assess the Specialist Candidate's abilities and future potential prior to offering career appointment as an Overseas Specialist. The limited appointment may be extended for one additional year, but must be terminated at the end of the fifth year if the Candidate does not obtain career tenure.

(3) The Candidate will receive the orientation and training necessary to serve overseas and will be assigned overseas in a position in his or her specialty. Broadcasting Board of Governors Civil Service employees selected as Overseas Specialist Candidates will be appointed only if the Board element to which they are currently assigned is willing to affirm in writing that a position at the appropriate level will be made available for the employee should the candidacy end unsuccessfully. Broadcasting Board of Governors Civil Service applicants will be appointed as Overseas Specialist Candidates on or about the date of their departure for post of assignment or upon assumption of an assignment (which has been identified and will follow a period of orientation in Washington). The Board may also assign a Candidate to a U.S.-based position for an initial assignment of up to 24 months when the Can-

didate will spend the majority of his/her time traveling overseas and will, except for the U.S. basing, be fully functioning as an Overseas Specialist. Specialist Candidates will compete for promotion by the Annual Overseas Specialist Selection Board with other officers in the same specialty and at the same class level. Specialist Candidates at the Class 1 level are ineligible for promotion into the Senior Foreign Service.

(4) The Specialist candidacy may be terminated at any time for unsatisfactory performance (22 U.S.C. 4011) or for such cause as will promote the efficiency of the Service (22 U.S.C. 4010).

(g) *Career appointment as an Overseas Specialist.* In accordance with section 3946 of title 22 United States Code, the decision to offer a Specialist Candidate a career appointment will be based on the recommendation made by the Annual Overseas Specialist Selection Board which reviews all employees in the Candidate's occupational category and class level.

(1) *Eligibility.* Specialist Candidates who have performed at least two years of overseas service will be eligible for review for career status at the time of the Candidate's third Board review. Candidates serving an initial tour in the U.S. but spending the majority of time working overseas will be credited with up to one year's overseas service, but no more than half of the time based in the U.S. If a Specialist Candidate is not recommended for career status during the initial review, the Candidate may be reviewed again when the next Annual Overseas Specialist Selection Board convenes if the initial Board so recommends.

(2) *Selection Board Review.* The Selection Board(s) will review the official performance file of the eligible Specialist Candidates and in accordance with established precepts, will determine whether the Candidates should be recommended for career appointment as Overseas Specialists. Recommendations by the Board will be based on the Candidate's demonstrated aptitude and fitness for a career in the Foreign Service in their occupational specialties. No quota or numerical limit is placed on the number of positive career status

Broadcasting Board of Governors

§ 501.8

decisions that can be made by Selection Boards. The Specialist candidacy will be terminated if the Candidate fails to be recommended for career status after a second Board review for tenuring. Candidates may be terminated earlier than the expiration of their limited appointment if so recommended by the Board and approved by the Director, Office of Personnel (M/P or VOA/P). Specialist Candidates recommended for career status by the Selection Board will be given Foreign Service career appointments (or redesignation) as Overseas Specialist, to take effect within one month of the Board's recommendation.

§ 501.7 Appointment as Chief of Mission.

(a) *Appointment by President.* Chiefs of mission are appointed by the President, by and with the advice and consent of the Senate. They may be career members of the Foreign Service or they may be appointed from outside the Service.

(b) *Recommendation of Foreign Service career members.* On the basis of recommendations made by the Director of Broadcasting Board of Governors, the Secretary of State from time to time furnishes the President with the names of Foreign Service career members qualified for appointment as chiefs of mission. The names of these officers, together with pertinent information concerning them, are given to the President to assist him in selecting qualified candidates for appointment as chiefs of mission.

(c) *Status of Foreign Service career members appointed as Chiefs of Mission.* Foreign Service career members who are appointed as chiefs of mission retain their career status as Foreign Service career members.

§ 501.8 Reappointment of Foreign Service Officers and Career Overseas Specialists.

The President may, by and with the advice and consent of the Senate, reappoint to the Service a former Foreign Service Officer who is separated from the Service. The Director (Broadcasting Board of Governors) may reappoint to the Service a former career Overseas Specialist.

(a) *Requirements for reappointment.* (1) On the date of application, each applicant must be a citizen of the United States.

(2) No applicant will be considered who has previously been separated from the Foreign Service pursuant to section 608 or 610 of the Foreign Service Act of 1980 (or predecessor section 633, 635, or 637 of the Foreign Service Act of 1946, as amended); or who resigned or retired in lieu of selection out or separation for cause.

NOTE: This requirement will not apply where it has been determined by the Foreign Service Grievance Board under 3 FAM 660 or by the Director, Office of Personnel, that the separation or the resignation or retirement in lieu of selection out or separation for cause was wrongful; where reappointment is determined by the Director, Office of Personnel, as an appropriate means to settle a grievance or complaint of a former Foreign Service career member on a mutually satisfactory basis; or where reappointment is the indicated redress in a proceeding under 3 FAM 130 "Equal Employment Opportunity."

(b) *Application.* Apply by letter addressed to the Director, Office of Personnel. Include the standard application forms, SF-171, Application for Federal Employment; and DSP-34, Supplement to Application for Federal Employment; and a brief resume of work and other experience since resignation from the Foreign Service. Whenever the Director, Office of Personnel, finds that the reappointment of one or more former Foreign Service Career Members may be in the best interest of the Service, all application forms, along with the available personnel files, will be referred as appropriate to the Board of Examiners for the Foreign Service which will conduct an advisory evaluation of the qualifications of each applicant.

(c) *Nature of evaluation.* (1) The Board of Examiners' advisory qualifications evaluation of FSO applicants (i) will be based on a review of all pertinent information relating to the applicant's record of employment in the Foreign Service and to subsequent experience, as well, and (ii) will take into consideration among other factors, the rank of the applicant's contemporaries in the Service in recommending the class in which the applicant will be reappointed under section 308 of the Foreign Service Act of 1980.

(2) In consultation with the Foreign Service Personnel Division (M/PP or VOA/PP) and officials from the pertinent Board elements, the Overseas Specialist applicant's total qualifications and experience will be evaluated based on the application and an interview. On the basis of this review and the recommendations of the appropriate officials, the personnel office will determine whether the application should be continued and, if so, will recommend the appointment class.

(d) *Medical examination and security investigation.* Qualified applicants and their dependents who will accompany them overseas will be given a physical examination. A security investigation will also be conducted. The reappointment action is subject to completion of a satisfactory security investigation and satisfactory medical examination of the applicant and his/her dependents.

(e) *Selection for reappointment.* The Director, Office of Personnel (M/P or VOA/P), taking into consideration (1) the qualifications and experience of each applicant as outlined in the qualifications evaluation performed by the Board of Examiners for the Foreign Service or the personnel office, (2) future placement and growth potential, and (3) the needs of the Service for the applicant's skills determines which applicant, or applicants, are qualified for reappointment and the appointment class that is considered to be appropriate. An Overseas Specialist may not be reappointed until and unless an overseas assignment has been identified. The Director, Office of Personnel (M/P or VOA/P) is responsible for initiating appointment action. Any voluntary applicant who refuses an offer of reappointment will not be considered for reappointment again.

§ 501.9 Interchange of FSOs between Broadcasting Board of Governors and other Foreign Affairs Agencies.

Foreign Service Officers (FSOs) desiring transfer from one agency to another may apply under the following provisions:

(a) *Applications.* Applications for interchange appointments should be sent to the Board of Examiners for the

Foreign Service, Department of State, Washington, DC 20520.

(b) *Certification and approval.* (1) When a Foreign Service Officer of another Foreign Affairs Agency wishes to transfer to the Broadcasting Board of Governors, a certification of need is required from the Director, Office of Personnel, Broadcasting Board of Governors, and approval is required by the Director of Personnel for the other agency for the officer's release to Broadcasting Board of Governors.

(2) When a Broadcasting Board of Governors FSO wishes to transfer to another Foreign Affairs Agency, a certification of need is required from the Director of Personnel of the other Agency, and approval is required by the Director, Office of Personnel, Broadcasting Board of Governors, for the officer's release to that Agency.

(3) A review by the Board of Examiners for the Foreign Service will certify the eligibility of candidates for exchange. BEX will notify the Office of Personnel, Broadcasting Board of Governors when a Foreign Service Officer of another Agency has been approved for transfer and Broadcasting Board of Governors will process the necessary employment papers.

(4) A new FSO appointment for officers transferring between another Foreign Affairs Agency and Broadcasting Board of Governors is not required.

PART 503—FREEDOM OF INFORMATION ACT REGULATION

Sec.

503.1 Introduction and definitions.

503.2 Making a request.

503.3 Availability of agency records.

503.4 Time limits.

503.5 Records available for public inspection.

503.6 Restrictions on some agency records.

503.7 Fees.

503.8 Exemptions.

503.9 Electronic records.

AUTHORITY: 5 U.S.C. 552 Reform Act of 1986 as amended by Pub. L. 99-570; sec. 1801-1804; U.S.C. 2658; 5 U.S.C. 301; 13 U.S.C. 8, E.O. 10477, as amended; 47 FR 9320, Apr. 2, 1982, E.O. 12356. 5 U.S.C. 552 (1988 & Supp. III 1991) as amended by Freedom of Information Reform Act of 1986, Pub. L. 99-570, Title I, sections 1801-1804, 100 Stat. 3207, 3207-48-50 (1986) (codified at 5 U.S.C. 552 (1988)); 22 U.S.C. 2658 (1988); 5 U.S.C. 301 (1988); 13 U.S.C. 8

Broadcasting Board of Governors

§ 503.1

(2988); E.O. 10477, 3 CFR 958 (1949–1953) as amended by E.O. 10822, 3 CFR 355 (1959–1963), E.O. 12292, 3 FR 134 (1982), E.O. 12356, 3 CFR 166 (1983), E.O. 12958 (1995).

SOURCE: 67 FR 8867, Feb. 27, 2002, unless otherwise noted.

§ 503.1 Introduction and definitions.

(a) *Introduction.* The Freedom of Information Act (FOIA) and this part apply to all records of The Broadcasting Board of Governors (BBG). As a general policy BBG follows a balanced approach in administering the FOIA. We recognize the right of public access to information in the Agency's possession, but we also seek to protect the integrity of the Agency's internal processes. This policy calls for the fullest possible disclosure of records consistent with those requirements of administrative necessity and confidentiality which are recognized by the FOIA.

(b) *Definitions:*

Access Appeal Committee or Committee means the Committee delegated by the Agency Head for making final agency determinations regarding appeals from the initial denial of records under the FOIA.

Agency or BBG means the Broadcasting Board of Governors. It includes all parts of the BBG in the U.S. and its worldwide operations.

Commercial use, when referring to a request, means that the request is from, or on behalf of, one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or of a person on whose behalf the request is made. Whether a request is for a commercial use depends on the purpose of the request and how the records will be used. The identity of the requester (individual, non-profit corporation, for-profit corporation), or the nature of the records, while in some cases indicative of that purpose or use, is not necessarily determinative. When a request is made by a representative of the news media, the request shall be deemed to be for a non-commercial use.

Department means any executive department, military department, government corporation, government controlled corporation, any independent regulatory agency, or other establish-

ment in the executive branch of the Federal Government. A private organization is not a department even if it is performing work under contract with the Government or is receiving Federal financial assistance. Grantee and contractor records are not subject to the FOIA unless they are in the possession and control of the BBG.

Duplication means the process of making a copy of a record and sending it to the requester, to the extent necessary to respond to the request. Such copies include paper copy, microform, audiovisual materials, and magnetic tapes, cards and discs.

Educational institution means a pre-school, elementary or secondary school, institution of undergraduate or graduate higher education, or institution of professional or vocational education.

FOIA means the Freedom of Information Act, section 552 of title 5, United States Code, as amended.

Freedom of Information Officer means the BBG official who has been delegated the authority to release or withhold records and assess, waive, or reduce fees in response to FOIA requests.

Non-commercial scientific institution means an institution that is not operated substantially for the purposes of furthering its own or someone else's business, trade, or profit interests, and that is operated for purposes of conducting scientific research whose results are not intended to promote any particular product or industry.

Records (and any other term used in this section in reference to information) include any information that would be an agency record subject to the requirements of this section when maintained by the Agency in any format, including an electronic format. Records also include any handwritten, typed or printed documents (such as memoranda, books, brochures, studies, writings, drafts, letters, transcripts, and minutes) and documentary material in other forms (such as punch-cards, magnetic tapes, cards, or discs; paper tapes; audio or video recordings, maps, photographs, slides, microfilm, and motion pictures). It does not include objects or articles such as exhibits, models, equipment, and duplication machines or audiovisual processing

materials. Reports does not include books, magazines, pamphlets, or other reference material in formally organized and officially designated BBG libraries, where such materials are available under the rules of the particular library.

Representative of the news media means a person actively gathering news for an entity organized and operated to publish or broadcast news to the public. *News* means information that is about current events or that would be of current interest to the public. News media entities include television and radio broadcasters, publishers of periodicals (to the extent they publish “news”) who make their products available for purchase or subscription by the general public, and entities that may disseminate news through other media (e.g., electronic dissemination of text). Freelance journalists shall be considered representatives of a news media entity if they can show a solid basis for expecting publication through such an entity. A publication contract or a requester’s past publication record may show such a basis.

Request means asking in writing for records whether or not the request refers specifically to the FOIA.

Review means examining the records to determine which portions, if any, may be released, and any other processing that is necessary to prepare the records for release. It includes only the first examination and processing of the requested documents for purposes of determining whether a specific exemption applies to a particular record or portion of a record.

Search means looking for records or portions of records responsive to a request. It includes reading and interpreting a request, and also page-by-page and line-by-line examination to identify responsive portions of a document. However, it does not include line-by-line examination where merely duplicating the entire page would be a less expensive and quicker way to comply with the request.

§ 503.2 Making a request.

(a) *How to request records.* All requests for documents shall be made in writing. Requests should be addressed to

The Broadcasting Board of Governors (BBG), FOIA/Privacy Act Officer, Office of the General Counsel, 330 Independence Avenue, SW, Suite 3349, Washington, DC 20237; telephone (202) 260-4404; or fax (202) 260-4394. Write the words “Freedom of Information Act Request” on the envelope and letter.

(b) *Details in your letter.* Your request for documents should provide as many details as possible that will help us find the records you are requesting. If there is insufficient information, we will ask you to provide greater details. Include your telephone number(s) to help us reach you if we have questions. If you are not sure how to write your request or what details to include, you may call the FOIA Office to request a copy of the Agency’s booklet “Guide and Index of Records,” or access the same information via the Internet on BBG’s World Wide Web site (<http://www.ibb.gov>). The more specific the request for documents, the sooner the Agency will be able to respond to your request(s).

(c) *Requests not handled under FOIA.* We will not provide documents requested under the FOIA and this part if the records are currently available in the National Archives, subject to release through the Archives, or commonly sold to the public by it or another agency in accordance with statutory authority (for example, records currently available from the Government Printing Office or the National Technical Information Service). Agency records that are normally freely available to the general public, such as BBG press releases, are not covered by the FOIA. Requests for documents from Federal departments, Chairmen of Congressional committees or subcommittees and court orders are not FOIA requests.

(d) *Referral of requests outside the agency.* If you request records that were created by or provided to us by another Federal department, we may refer your request to or consult with that department. We may also refer requests for classified records to the department that classified them. In cases of referral, the other department is responsible for processing and responding to your request under that department’s regulation. When possible, we

will notify you when we refer your request to another department.

(e) *Responding to your request*—(1) *Retrieving records*. The Agency is required to furnish copies of records only when they are in our possession and control. If we have stored the records you want in a record retention center, we will retrieve and review them for possible disclosure. However, the Federal Government destroys many old records, so sometimes it is impossible to fill requests. The Agency's record retention policies are set forth in the General Records Schedules of the National Archives and Records Administration and in BBG's Records Disposition Schedule, which establish time periods for keeping records before they may be destroyed.

(2) *Furnishing records*. (i) The Agency is only required to furnish copies of records that we have or can retrieve. We are not compelled to create new records. The Agency will aid requesters by providing records and information in the form requested, including electronic format, if we can readily reproduce them in that form or format.

(ii) We may decide to conserve government resources and at the same time supply the records you need by consolidating information from various records, in paper form or electronically, rather than copying them all. If the effort to produce records in electronic format would significantly interfere with the operations of the Agency, we will consider the effort to be an unreasonable search.

(iii) The Agency is required to furnish only one copy of a record. If we are unable to make a legible copy of a record to be released, we will not attempt to reconstruct it. Rather we will furnish the best copy possible and note its poor quality in our reply or on the copy.

(iv) If we cannot accommodate your request for form or format, we will provide responsive, nonexempt information in a reasonably accessible form.

§ 503.3 Availability of agency records.

(a) *Release of records*. If we have released a record or part of a record to others in the past, we will ordinarily release it to you also. This principle does not apply if the previous release

was an unauthorized disclosure. However, we will not release it to you if a statute forbids this disclosure and we will not necessarily release it to you if an exemption applies in your situation and did not apply or applied differently in the previous situation.

(b) *Denial of requests*. All denials are in writing and describe in general terms the material withheld and state the reasons for the denial, including a reference to the specific exemption of the FOIA authorizing the withholding or deletion. The denial also explains your right to appeal the decision and it will identify the official to whom you should send the appeal. Denial letters are signed by the person who made the decision to deny all or part of the request, unless otherwise noted.

(c) *Unproductive searches*. We will make a diligent search for records to satisfy your request. Nevertheless, we may not be able always to find the records you want using the information you provided, or they may not exist. If we advise you that we have been unable to find the records despite a diligent search, you will nevertheless be provided the opportunity to appeal the adequacy of the Agency's search. However, if your request is for records that are obviously not connected with this Agency or your request has been provided to us in error, a "no records" response will not be considered an adverse action and you will not be provided an opportunity to appeal.

(d) *Appeal of denials*. You have the right to appeal a partial or full denial of your FOIA request. To do so, you must put your appeal in writing and address it to the official identified in the denial letter. Your appeal letter must be dated and postmarked within 30 calendar days from the date of the Agency's denial letter. Because we have some discretionary authority in deciding whether to release or withhold records, you may strengthen your appeal by explaining your reasons for wanting the records. However, you are not required to give any explanation. Your appeal will be reviewed by the Agency's Access Appeal Committee that consists of senior Agency officials. When the Committee responds to your appeal, that constitutes the Agency's

§ 503.4

final action on the request. If the Access Appeal Committee grants your appeal in part or in full, we will send the records to you promptly or set up an appointment for you to inspect them. If the decision is to deny your appeal in part or in full, the final letter will state the reasons for the decision, name the officials responsible for the decision, and inform you of the FOIA provisions for judicial review.

§ 503.4 Time limits.

(a) *General.* The FOIA sets certain time limits for us to decide whether to disclose the records you requested, and to decide appeals. If we fail to meet the deadlines, you may proceed as if we had denied your request or your appeal. Since requests may be misaddressed or misrouted, you should call or write to confirm that we have the request and to learn its status if you have not heard from us in a reasonable time.

(b) *Time allowed.* (1) We will decide whether to release records within 20 working days after your request reaches the appropriate area office that maintains the records you are requesting. When we decide to release records, we will actually provide the records at that time, or as soon as possible after that decision, or let you inspect them as soon as possible thereafter.

(2) We will decide an appeal within 20 working days after the appeal reaches the appropriate reviewing official.

(3)(i) The FOIA Officer or appeal official may extend the time limits in unusual circumstances for initial requests or appeals, up to 10 working days. We will notify you in writing of any extensions. "Unusual circumstances" include situations where we: Search for and collect records from field facilities, records centers or locations other than the office processing the records; search for, collect, or examine a great many records in response to a single request; consult with another office or department that has substantial interest in the determination of the request; and/or conduct negotiations with submitters and requesters of information to determine the nature and extent of non-disclosable proprietary materials.

(ii) If an extra ten days still does not provide sufficient time for the Agency

22 CFR Ch. V (4–1–05 Edition)

to deal with your request, we will inform you that the request cannot be processed within the statutory time limit and provide you with the opportunity to limit the scope of your request and/or arrange with us a negotiated deadline for processing your request.

(iii) If you refuse to reasonably limit the scope of your request or refuse to agree upon a time frame, the Agency will process your case, as it would have, had no modification been sought. We will make a diligent, good faith effort to complete our review within the statutory time frame.

§ 503.5 Records available for public inspection.

(a) To the extent that they exist, we will make the following records of general interest available for you in paper form or electronically for inspection or copying:

(1) Orders and final opinions, including concurring and dissenting opinions in adjudications. (See § 503.8(e) of this part for availability of internal memoranda, including attorney opinions and advice.)

(2) Statements of policy and interpretations that we have adopted but which have not been published in the FEDERAL REGISTER.

(3) Administrative staff manuals and instructions to staff that affect the public. (We will not make available, however, manuals or instructions that reveal investigative or audit procedures as described in § 503.8(b) and (g) of this part.)

(4) In addition to such records as those described in this paragraph (a), we will make available to any person a copy of all other Agency records, in the format requested, if available, unless we determine that such records should be withheld from disclosure under subsection (b) of the Act and §§ 503.8 and 503.9 of this part.

(b) Before releasing these records, however, we may delete the names of people, or information that would identify them, if release would invade their personal privacy to a clearly unwarranted degree (See § 503.8(f)).

(c) The Agency's FOIA Guide and Index is available electronically via

Broadcasting Board of Governors

§ 503.7

the Internet, or you may request a copy of it by mail.

§ 503.6 Restrictions on some agency records.

Under the U.S. Information and Educational Exchange Act of 1948 (22 U.S.C. 1461, as amended), the BBG is prohibited from disseminating within the United States information about the U.S., its people, and its policies when such materials have been prepared by the Agency for audiences abroad. This includes films, radio scripts and tapes, videotapes, books, and similar materials produced by the Agency. However, this law does provide that upon request, such information shall be made available at BBG, for examination only, by representatives of the press, magazines, radio systems and stations, research students or scholars and available, for examination only, to Members of Congress.

§ 503.7 Fees.

(a) *Fees to be charged—categories of requests.* Paragraphs (a)(1) through (3) and (b) through (e) of this section explain each category of request and the type of fees that we will generally charge. However, for each of these categories, the fees may be limited, waived, or reduced for the reasons given in paragraph (e) of this section. “Request” means asking for records, whether or not you refer specifically to the Freedom of Information Act (FOIA). Requests from Federal agencies and court orders for documents are not included within this definition. “Review” means, when used in connection with processing records for a commercial use request, examining the records to determine what portions, if any, may be withheld, and any other processing that is necessary to prepare the records for release. It includes only the examining and processing that are done the first time we analyze whether a specific exemption applies to a particular record or portion of a record. It does not include the process of researching or resolving general legal, or policy issues regarding exemptions. “Search” means looking for records or portions of records responsive to a request. It includes reading and interpreting a request, and also and line-by-line exam-

ination to identify responsive portions of a document.

(1) *Commercial use request.* If your request is for a commercial use, BBG will charge you the costs of search, review and duplication. “Commercial use” means that the request is from or on behalf of one whom seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or of a person on whose behalf the request is made. Whether a request is for a commercial use depends on the purpose of the request and how the records will be used; the identity of the requester (individual, non-profit corporation, for-profit corporation), or the nature of the records, while in some cases may indicate the purpose or use is not necessarily determinative. When a request is made by a representative of the news media, a purpose of use which supports the requester’s news dissemination function is deemed to be a non-commercial use.

(2) *Educational and scientific institutions and news media.* If you are an educational institution or a non-commercial scientific institution, operated primarily for scholarly or scientific research, or a representative of the news media, and your request is not for a commercial use, BBG will charge you only for the duplication of documents. Also BBG will not charge you the copying costs for the first 100 pages of duplication. “Educational institution” means a preschool, elementary or secondary school, institution of undergraduate or graduate higher education, or institution of professional or vocational education. “Non-commercial scientific institution” means an institution that is not operated substantially for purposes of furthering its own or someone else’s business, trade, or profit interests, and that is operated for purposes of conducting scientific research whose results are not intended to promote any particular product or industry. “Representative of the news media” means a person actively gathering news for an entity organized and operated to publish or broadcast news to the public. “News” means information that is about current events or that would be of current interest to the

public. News media entities include television and radio broadcasters, publishers of periodicals (to the extent they publish “news”) who make their products available for purchase or subscription by the general public, and entities that may disseminate news through other media (e.g., electronic dissemination of text). We will treat freelance journalists as representatives of a news media entity if they can show a solid basis for expecting publication through such an entity. A publication contract is such a basis and the requester’s past publication record may show such a basis.

(3) *Other requesters.* If your request is not the kind described by paragraph (a)(1) or (a)(2) of this section, then the BBG will charge you only for search and duplication. Also, we will not charge you for the first two hours of search time or for the copying costs of the first 100 pages of duplication.

(b) *Fees to be charged—general provisions.* (1) We may charge search fees even if the records we find are exempt from disclosure, or even if we do not find any records at all.

(2) We will not charge you any fee at all if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. We have estimated that cost to be \$5.00.

(3) If we determine that you are acting alone or with others to break down a single request into a series of requests in order to avoid or reduce the fees charged, we may aggregate all these requests for purposes of calculating the fees charged.

(4) We will charge interest on unpaid bills beginning on the 31st day following the day the bill was sent. The accrual of interest will stop upon receipt of the fee, rather than upon its processing by BBG. Interest will be at the rate prescribed in section 3717 of Title 32 U.S.C.

(c) *Fee schedule—BBG will charge the following fees:* (1) Manual searching for or reviewing of records:

(i) When performed by employees at salary grade GS-1 through GS-8 or FS-9 through FS-5—an hourly rate of \$10.00 will be charged;

(ii) When performed by employees at salary grade GS-9 through GS-13 or

FS-5 through FS-2—an hourly rate of \$20.00 will be charged;

(iii) When performed by employees at salary grade GS-14 or above or FS-2 or above—an hourly rate of \$36.00 will be charged.

(iv) When a search involves employees at more than one of these levels, we will charge the appropriate rate for each.

(2) Computer searching and printing. Except in unusual cases, the cost of computer time will not be a factor in calculating the two free hours of search time. In those unusual cases, where the cost of conducting a computerized search significantly detracts from the Agency’s ordinary operations, no more than the dollar cost of two hours of manual search time shall be allowed. For searches conducted beyond the first two hours, the Agency shall only charge the direct costs of conducting such searches.

(3) Photocopying standard size pages—\$0.15 per page.

(4) Photocopying odd-size documents (such as punchcards or blueprints) or reproducing other records (such as tapes)—the actual cost of operating the machine, plus the actual cost of the materials used, plus charges for the time spent by the operator, at the rates given in paragraph (c)(1) of this section.

(5) Certifying that records are true copies—this service is not required by the FOIA. If we agree to provide it, we will charge \$10.00 per certification.

(6) Sending records by express mail, certified mail, or other special methods. This service is not required by the FOIA. If we agree to provide it, we will charge our actual cost.

(7) Performing any other special service that you request and to which we agree—actual cost of operating any machinery, plus actual cost of any materials used, plus charges for the time of our employees, at the rates given in paragraph (c)(1) of this section.

(d) *Procedures for assessing and collecting fees—*(1) *Agreement to pay.* We generally assume that when you request records you are willing to pay the fees we charge for services associated with your request. You may specify a limit on the amount you are willing to spend. We will notify you if it

appears that the fees will exceed the limit and ask whether you nevertheless want us to proceed with the search.

(2) *Advance payment.* If you have failed to pay previous bills in a timely manner, or if our initial review of your request indicates that we will charge you fees exceeding \$250.00, we will require you to pay your past due fees and/or the estimated fees, or a deposit, before we start searching for the records you want, or before we send them to you. In such cases, the administrative time limits as described in Sec. 503.4(b), will begin only after we come to an agreement with you over payment of fees, or decide that a fee waiver or reduction is appropriate.

(e) *Waiver or reduction of fees.* We will waive or reduce the fees we would otherwise charge if disclosure of the information meets both of the following tests (paragraphs (e)(1) and (e)(2) of this section):

(1) It is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities, regardless of any other public interest it may further. In making this determination, we may consider:

(i) Whether the requester is in a position to contribute to public understanding;

(ii) Whether the requester has such knowledge or expertise as may be necessary to understand the information; and

(iii) Whether the requester's intended use of the information would be likely to disseminate the information among the public.

(2) It is not primarily in the commercial interest of the requester. Commercial interests include interests relating to business, trade, and profit. Not only profit-making corporations have commercial interests; so do nonprofit corporations, individuals, unions, and other associations.

(3) You must make your request for a waiver or reduction at the same time you make your request for records. Only the FOIA Officer may make the decision whether to waive or reduce the fees. If we do not completely grant your request for a waiver or reduction, the denial letter will designate the appeal official.

§ 503.8 Exemptions.

Section 552(b) of the Freedom of Information Act contains nine exemptions to the mandatory disclosure of records. These exemptions and their application by the Agency are described below. In some cases, more than one exemption may apply to the same document. This section does not itself authorize the giving of any pledge of confidentiality by any officer or employee of the Agency.

(a) *Exemption one—National defense and foreign policy.* We are not required to release records that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified according to such Executive Order. Executive Order No. 12958 (1995) provides for such classification. When the release of certain records may adversely affect U.S. relations with foreign countries, we usually consult with officials with knowledge of those countries and/or with officials of the Department of State. We may also have in our possession records classified by another agency. If we do, we may consult with that agency or may refer your request to that agency for their direct response to you. If possible, we will notify you that we have made such a referral.

(b) *Exemption two—Internal personnel rules and practices.* We are not required to release records that are related solely to the internal personnel rules and practices of an agency. We may withhold routine internal agency procedures such as guard schedules and luncheon periods. We may also withhold internal records the release of which would help some persons circumvent the law or Agency regulations.

(c) *Exemption three—Records exempted by other statutes.* We are not required to release records if another statute specifically allows us to withhold them. Another statute may be used only if it absolutely prohibits disclosure or if it sets forth criteria identifying particular types of material to be withheld (for example, the statute discussed in § 503.6).

(d) *Exemption four—Trade secrets and confidential commercial or financial information.* We will withhold trade secrets and commercial or financial information that is obtained from a person and is privileged or confidential.

(1) *Trade secrets:* A trade secret is a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. A direct relationship is necessary between the trade secret and the productive process.

(2) Commercial or financial information, obtained from a person, and is privileged or confidential.

(i) Information is “commercial or financial” if it relates to businesses, commerce, trade, employment, profits, or finances (including personal finances).

(ii) Information is obtained from someone outside the Federal Government or from someone within the Government who has a commercial or financial interest in the information. “Person” includes an individual, partnership, corporation, association, state or foreign government, or other organization. Information is not “obtained from a person” if it is generated by BBG or another Federal agency.

(iii) Information is “privileged” if it would ordinarily be protected from disclosure in civil discovery by a recognized evidentiary privilege, such as the attorney-client privilege, or the work-product privilege. Information may be privileged for this purpose under a privilege belonging to a person outside the Government, unless the providing of the information to the Government rendered the information no longer protectible in civil discovery.

(iv) Information is “confidential” if it meets one of the following tests:

(A) Disclosure may impair the Government’s ability to obtain necessary information in the future;

(B) Disclosure would substantially harm the competitive position of the person who submitted the information;

(C) Disclosure would impair other Government interests, such as program effectiveness and compliance; or

(D) Disclosure would impair other private interests, such as an interest in controlling availability of intrinsically valuable records, which are sold in the market by their owner.

(3) *Designation of certain confidential information.* A person who submits records to the Government may designate part or all of the information in such records as exempt from disclosure under Exemption four. The person may make this designation either at the time the records are submitted to the Government or within a reasonable time thereafter. The designation must be in writing. The legend prescribed by a request for proposal or request for quotations according to any agency regulation establishing a substitute for the language is sufficient but not necessary for this purpose. Any such designation will expire ten years after the records were submitted to the Government.

(4) *Predisclosure notification.* The procedures in this paragraph apply to records that were submitted to the Government and where we have substantial reason to believe that information in the records could reasonably be considered exempt under Exemption four. Certain exceptions to these procedures are stated in paragraph (d)(5) of this section.

(i) When we receive a request for such records and we determine that we may be required to disclose them, we will make reasonable efforts to notify the submitter about these facts. The notice will inform the submitter about the procedures and time limits for submission and consideration of objections to disclosure. If we must notify a large number of submitters, we may do this by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it.

(ii) The submitter has ten (10) working days from receipt of the notice to object to disclosure of any part of the records and to state all bases for its objections.

(iii) We will give consideration to all bases that have been timely stated by the submitter. If we decide to disclose the records and the submitter still does not agree, we will send a written notice to the submitter stating briefly why we did not sustain its objections and we

will provide a copy of the records as we intend to release them. The notice will state that we will disclose the records five (5) working days after the submitter receives the notice unless we are ordered by a United States District Court not to release them.

(iv) When a requester files suit under the FOIA to obtain records covered by this paragraph, we will promptly notify the submitter.

(v) Whenever we send a notice to a submitter under paragraph (d)(4)(i) of this section, we will notify you that we are giving the submitter a notice and an opportunity to object.

(5) Exceptions to predisclosure notification. The notice requirements in paragraph (d)(4) of this section do not apply in the following situations:

(i) We decide not to disclose the records;

(ii) The information has previously been published or made generally available;

(iii) We have already notified the submitter of previous requests for the same records and have come to an understanding with that submitter about the records;

(iv) Disclosure is required by a statute other than the FOIA;

(v) Disclosure is required by a regulation, issued after notice and opportunity for public comment that specifies narrow categories of records that are to be disclosed under the FOIA. In this case a submitter may still designate records as described in paragraph (d)(3) of this section and in exceptional cases, at our discretion, may follow the notice procedures in paragraph (d)(4) of this section;

(vi) The designation appears to be obviously frivolous, but in this case we will still give the submitter the written notice required by paragraph (d)(4)(iii) of this section (although this notice need not explain our decision or include a copy of the records); and

(vii) We withhold the information because another statute requires its withholding.

(e) *Exemption five—Internal memoranda.* This exemption covers internal Government communications and notes that fall within a generally recognized evidentiary privilege. Internal Government communications include

an agency's communications with an outside consultant or other outside person, with a court, or with Congress, when those communications are for a purpose similar to the purpose of privileged intra-agency communications. Some of the most common applicable privileges are:

(1) *The deliberative process privilege.*

This privilege protects predecisional deliberative communications. A communication is protected under this privilege if it was made before a final decision was reached on some question of policy and if it expressed recommendations or opinions on that question. The purpose of this privilege is to prevent injury to the quality of the agency decision making process by encouraging open and frank internal policy discussions, by avoiding premature disclosure of policies not yet adopted, and by avoiding the public confusion that might result from disclosing reasons that were not in fact the ultimate grounds for an agency's decision. This privilege continues to protect pre-decisional documents even after a decision is made. We will release purely factual material in a deliberative document unless that material is otherwise exempt. However, purely factual material in a deliberative document is within this privilege if:

(i) It is inextricably intertwined with the deliberative portions so that it cannot reasonably be segregated; or

(ii) It would reveal the nature of the deliberative portions, or

(iii) Its disclosure would in some other way make possible an intrusion into the decision making process.

(2) *Attorney-client privilege.* This privilege protects confidential communications between a lawyer and an employee or agent of the Government where an attorney-client relationship exists (for example, where the lawyer is acting as attorney for the agency and the employee is communicating on behalf of the agency) and where the employee has communicated information to the attorney in confidence in order to obtain legal advice or assistance, and/or when the attorney has given advice to the client.

(3) *Attorney work product privilege.* This privilege protects documents prepared by or for an agency, or by or for its representative (usually BBG attorneys) in anticipation of litigation or for trial. It includes documents prepared for purposes of administrative adjudications as well as court litigation. It includes factual material in such documents as well as material revealing opinions and tactics. The privilege continues to protect the documents even after the litigation is closed.

(f) *Exemption six—Clearly unwarranted invasion of personal privacy.* We may withhold personnel, medical, and similar files, and personal information about individuals if disclosure would constitute a clearly unwarranted invasion of personal privacy.

(1) *Balancing test.* In deciding whether to release records that contain personal or private information about someone else to a requester, we weigh the foreseeable harm of invading that individual's privacy against the public benefit that would result from the release of the information. In our evaluation of requests for records, we attempt to guard against the release of information that might involve a violation of personal privacy by a requester being able to "piece together items" or "read between the lines" information that would normally be exempt from mandatory disclosure.

(2) *Information frequently withheld.* We frequently withhold such information as home addresses, home telephone numbers, ages, minority group status, social security numbers, individual's benefits, earning records, leave records, etc.

(g) *Exemption seven—Law enforcement.* We are not required to release information or records that the Government has compiled for law enforcement purposes. The records may apply to actual or potential violations of either criminal or civil laws or regulations. We can withhold these records only to the extent that releasing them would cause harm in at least one of the following situations:

(1) *Enforcement proceedings.* We may withhold information when release could reasonably be expected to interfere with prospective or ongoing law

enforcement proceedings, investigations of fraud and mismanagement, employee misconduct, and civil rights violations may fall into this category. In certain cases, we may refuse to confirm or deny the existence of records that relate to violations in order not to disclose that an investigation is in progress or may be conducted.

(2) *Fair trial or impartial adjudication.* We may withhold records when release would deprive a person of a fair trial or an impartial adjudication because of prejudicial publicity.

(3) *Personal privacy.* We are careful not to disclose information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. When a name surfaces in an investigation, that person is likely to be vulnerable to innuendo, rumor, harassment, or retaliation.

(4) *Confidential sources and information.* We may withhold records whose release could reasonably be expected to disclose the identity of a confidential source of information. A confidential source may be an individual; a state, local or foreign Government agency; or any private organization. The exemption applies whether the source provides information under an express promise of confidentiality or under circumstances from which such an assurance could be reasonably inferred. Also, where the record or information in it has been compiled by a criminal law enforcement authority conducting a criminal investigation or by an agency conducting a lawful national security investigation, the exemption also protects all information supplied by a confidential source. Also protected from mandatory disclosure is any information which, if disclosed, could reasonably be expected to jeopardize the system of confidentiality that assures a flow of information from sources to investigatory agencies.

(5) *Techniques and procedures.* We may withhold records reflecting special techniques or procedures of investigation or prosecution not otherwise generally known to the public. In some cases, it is not possible to describe even in general terms those techniques without disclosing the very material to be withheld. We may also withhold records whose release would disclose

guidelines for law enforcement investigations or prosecutions if this disclosure could reasonably be expected to create a risk that someone could circumvent requirements of law or of regulation.

(6) *Life and physical safety.* We may withhold records whose disclosure could reasonably be expected to endanger the life or physical safety of any individual. This protection extends to threats and harassment as well as to physical violence.

(h) *Exemptions eight and nine—Records on financial institutions and records on wells.*

(1) Exemption eight permits us to withhold records about regulation or supervision of financial institutions.

(2) Exemption nine permits the withholding of geological and geophysical information and data, including maps concerning wells.

§ 503.9 Electronic records.

(a) *Introduction.* This section applies to all records of the BBG, including all of its worldwide operations. Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspections and at the request of any person for any public or private use. The increase in the Government's use of computers enhances the public's access to Government information. This section addresses and explains how records will be reviewed and released when the records are maintained in electronic format. Documentation not previously subject to the FOIA when maintained in a non-electronic format is not made subject to FOIA by this law.

(b) *Definitions—*(1) *Compelling need.* Obtaining records on an expedited basis because of an imminent threat to the life or physical safety of an individual, or urgently needed by an individual primarily engaged in disseminating information to the public concerning actual or alleged Federal Government activities.

(2) *Discretionary disclosure.* Records or information normally exempt from disclosure will be released whenever it is possible to do so without reasonably foreseeable harm to any interest protected by an FOIA exemption.

(3) *Electronic reading room.* The room provided which makes electronic records available.

(c) *Electronic format of records.* (1) Materials such as agency opinions and policy statements (available for public inspection and copying) will be available electronically by accessing the BBG's Home Page via the Internet at <http://www.ibb.gov>. To set up an appointment to view such records in hard copy or to access the Internet via the BBG's computer, please contact the FOIA/Privacy Act Officer at (202) 260-4404.

(2) We will make available for public inspection and copying, both electronically via the Internet and in hard copy, those records that have been previously released in response to FOIA requests, when we determine the records have been or are likely to be the subject of future requests.

(3) We will provide both electronically through our Internet address and in hard copy a "Guide" on how to make an FOIA request, and an Index of all Agency information systems and records that may be requested under the FOIA.

(4) We may delete identifying details when we publish or make available the index and copies of previously-released records to prevent a clearly unwarranted invasion of personal privacy.

(i) We will indicate the extent of any deletions made from the place the deletion was made, if possible.

(ii) We will not reveal information about deletions if such disclosure would harm an interest protected by an exemption.

(d) *Honoring form or format requests.* We will aid requesters by providing records and information in the form requested, including electronic format, if we can readily reproduce them in that form or format. However, if we cannot accommodate you, we will provide responsive, nonexempt information in a reasonably accessible form.

(1) We will make a reasonable effort to search for records kept in an electronic format. However, if the effort would significantly interfere with the operations of the agency or the agency's use of its computers, we will consider the effort to be unreasonable.

(2) We need not create documents that do not exist, but computer records found in a database rather than in a file cabinet may require the application of codes or some form of programming to retrieve the information. This application of codes or programming of records will not amount to the creation of records.

(3) Except in unusual cases, the cost of computer time will not be a factor in calculating the two free hours of search time available under Sec. 503.7. In those unusual cases, where the cost of conducting a computerized search significantly detracts from the agency's ordinary operations, no more than the dollar cost of two hours of manual search time shall be allowed. For searches conducted beyond the first two hours, the agency shall only charge the direct costs of conducting such searches.

(e) *Technical feasibility of redacting non-releasable material.* We will make every effort to indicate the place on the record where a redaction of non-releasable material is made, and an FOIA citation noting the applicable exemption for the deletion will also be placed at the site. If unable to do so, we will notify you of that fact.

(f) *Ensuring timely response to request.* We will make every attempt to respond to FOIA requests within the prescribed 20 working-day time limit. However, processing some requests may require additional time in order to properly screen material against the inadvertent disclosure of material covered by the exemptions.

(1) *Multitrack first-in first-out processing.* (i) Because the agency expects to be able to process its requests without a backlog of cases, BBG will not institute a multitrack system. Those cases that may be handled easily, because they require only a few documents or a simple answer, will be handled immediately by an FOIA specialist.

(ii) If you wish to qualify for faster processing, you may limit the scope of your request so that we may respond more quickly.

(2) *Unusual circumstances.* (i) The agency may extend for a maximum of ten working days the statutory time limit for responding to an FOIA re-

quest by giving notice in writing as to the reason for such an extension. The reasons for such an extension may include: the need to search for and collect requested records from multiple offices; the volume of records requested; and, the need for consultation with other components within the agency.

(ii) If an extra ten days still does not provide sufficient time for the Agency to deal with your request, we will inform you that the request cannot be processed within the statutory time limit and provide you with the opportunity to limit the scope of your request and/or arrange with us a negotiated deadline for processing your request.

(iii) If you refuse to reasonably limit the scope of your request or refuse to agree upon a time frame, the agency will process your case, as it would have, had no modification been sought. We will make a diligent, good-faith effort to complete our review within the statutory time frame.

(3) *Grouping of requests.* We will group together requests that clearly involve related material that should be considered as a single request.

(i) If you make multiple or related requests for similar material for the purpose of avoiding costs, we will notify you that we are grouping together your requests, and the reasons why.

(ii) Multiple or related requests may also be grouped, such as those involving requests and schedules but you will be notified in advance if we intend to do so.

(g) *Time periods for agency consideration of requests—(1) Expedited access.* We will authorize expedited access to requesters who show a compelling need for access, but the burden is on the requester to prove that expedition is appropriate. We will determine within ten days whether or not to grant a request for expedited access and we will notify the requester of our decision.

(2) *Compelling need for expedited access.* Failure to obtain the records within an expedited deadline must pose an imminent threat to an individual's life or physical safety; or the request must be made by someone primarily engaged in disseminating information, and who has an urgency to inform the

Broadcasting Board of Governors

§ 505.1

public about actual or alleged Federal Government activity.

(3) *How to request expedited access.* We will be required to make factual and subjective judgments about the circumstances cited by requesters to qualify them for expedited processing. To request expedited access, your request must be in writing and it must explain in detail your basis for seeking expedited access. The categories for compelling need are intended to be narrowly applied:

(i) *A threat to an individual's life or physical safety.* A threat to an individual's life or physical safety should be imminent to qualify for expedited access to the records. You must include the reason why a delay in obtaining the information could reasonably be foreseen to cause significant adverse consequences to a recognized interest.

(ii) *Urgency to inform.* The information requested should pertain to a matter of a current exigency to the American public, where delay in response would compromise a significant recognized interest. The person requesting expedited access under an "urgency to inform," must be primarily engaged in the dissemination of information. This does not include individuals who are engaged only incidentally in the dissemination of information. "Primarily engaged" requires that information dissemination be the main activity of the requester. A requester only incidentally engaged in information dissemination, besides other activities, would not satisfy this requirement. The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

(4) *Estimation of matter denied.* The agency will try to estimate the volume of any denied material and provide the estimate to the requester, unless doing so would harm an interest protected by an exemption.

(h) *Computer redaction.* The agency will identify the location of deletions in the released portion of the records, and where technologically possible, will show the deletion at the place on the record where the deletion was made, unless including that indication would harm an interest protected by an exemption.

(i) *Annual report on FOIA activities.* Reports on FOIA activities are submitted each fiscal year to the Department of Justice, and are due by February 1 of every year. The BBG's report will be available both in hard copy and through the Internet. The Department of Justice will also report all Federal agency FOIA activity through electronic means.

(j) *Reference materials and guides.* The agency has available in hard copy, and electronically through the Internet, a guide for requesting records under the FOIA, and an index and description of all major information systems of the agency. The guide is a simple explanation of what the FOIA is intended to do, and how you can use it to access BBG records. The Index explains the types of records that may be requested from the Agency through FOIA requests and why some records cannot, by law, be made available by the BBG.

PART 505—PRIVACY ACT REGULATION

Sec.

505.1 Purpose and scope.

505.2 Definitions.

505.3 Procedures for requests.

505.4 Requirements and identification for making requests.

505.5 Disclosure of information.

505.6 Medical records.

505.7 Correction or amendment of record.

505.8 Agency review of requests for changes.

505.9 Review of adverse agency determination.

505.10 Disclosure to third parties.

505.11 Fees.

505.12 Civil remedies and criminal penalties.

505.13 General exemptions (Subsection (j)).

505.14 Specific exemptions (Subsection (k)).

505.15 Exempt systems of records used.

AUTHORITY: Pub. L. 93-579, 88 Stat. 1897; 5 U.S.C. 552a.

SOURCE: 67 FR 8875, Feb. 27, 2002, unless otherwise noted.

§ 505.1 Purpose and scope.

The Broadcasting Board of Governors (BBG) will protect individuals' privacy from misuses of their records, and grant individuals access to records concerning them which are maintained by the Agency's domestic and overseas offices, consistent with the provisions of Public Law 93-579, 88 Stat. 1897; 5 U.S.C.

§ 505.2

552a, the Privacy Act of 1974, as amended. The Agency has also established procedures to permit individuals to amend incorrect records, to limit the disclosure of personal information to third parties, and to limit the number of sources of personal information. The Agency has also established internal rules restricting requirements of individuals to provide social security account numbers.

§ 505.2 Definitions.

(a) *Access Appeal Committee (AAC)*. The body established by and responsible to the Broadcasting Board for reviewing appeals made by individuals to amend records held by the Agency.

(b) *Agency, BBG, our, we or us*. The BBG, its offices, divisions, branches and its worldwide operations.

(c) *Amend*. To make a correction to or expunge any portion of a record about an individual which that individual believes is not accurate, relevant, timely or complete.

(d) *Individual or you*. A citizen of the United States or an alien lawfully admitted for permanent residence.

(e) *Maintain*. Collect, use, store, disseminate or any combination of these record keeping functions; exercise of control over and hence responsibility and accountability for systems of records.

(f) *Record*. Any information maintained by the Agency about an individual that can be reproduced, including finger or voice prints and photographs, and which is retrieved by that particular individual's name or personal identifier, such as a social security number.

(g) *Routine use*. With respect to the disclosure of a record, the use of such record for a purpose, which is compatible with the purpose for which it was collected. The common ordinary purposes for which records are used and all of the proper and necessary uses even if any such uses occur infrequently.

(h) *Statistical record*. A record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided in 12 U.S.C.8.

22 CFR Ch. V (4-1-05 Edition)

(i) *System of records*. A group of records under the maintenance and control of the Agency from which information is retrieved by the name or personal identifier of the individual.

(j) *Personnel record*. Any information about an individual that is maintained in a system of records by the Agency that is needed for personnel management or processes such as staffing, employee development, retirement, grievances and appeals.

(k) *Worldwide Operations*. Any of the foreign service establishments of the Agency.

§ 505.3 Procedures for requests.

(a) The agency will consider all written requests received from an individual for records pertaining to herself/himself as a request made under the Privacy Act of 1974, as amended (5 U.S.C. 552a) whether or not the individual specifically cites the Privacy Act when making the request.

(b) All requests under the Privacy Act should be directed to the FOIA/Privacy Act Office, Office of the General Counsel, Broadcasting Board of Governors, Suite 3349, 330 Independence Avenue, SW, Washington, DC 20237, which will coordinate the search of all systems of records specified in the request. Requests should state name, date of birth, and social security number.

(c) Requests directed to any of the Agency's worldwide establishments which involve routine unclassified, administrative and personnel records available only at those establishments may be released to the individual by the establishment if it determines that such a release is authorized by the Privacy Act. All other requests shall be submitted by the establishment to the FOIA/Privacy Act Office, Office of the General Counsel, Broadcasting Board of Governors, Suite 3349, 330 Independence Avenue, SW, Washington, DC 20237, and the individual shall be so notified of this section in writing, when possible.

(d) In those instances where an individual requests records pertaining to herself/himself, as well as records pertaining to another individual, group or some other category of the Agency's

Broadcasting Board of Governors

§ 505.6

records, only that portion of the request which pertains to records concerning the individual will be treated as a Privacy Act request. The remaining portions of such a request will be processed as a Freedom of Information Act request and sent to the office noted in paragraph (b) of this section.

§ 505.4 Requirements and identification for making requests.

(a) When you seek access to Agency records, you may present your written request, fax it to (202) 260-4394 or mail it to the FOIA/Privacy Act Office, Office of the General Counsel, Broadcasting Board of Governors, Suite 3349, 330 Independence Avenue, SW, Washington, DC 20237. The FOIA/Privacy Act Office may be visited between the hours of 9 a.m. and 3 p.m., Monday through Friday, except for legal holidays.

(b) When you seek access to Agency records, you will be requested to present identification. You must state your full name, date of birth and social security number. You must also include your present mailing address and zip code, and if possible, a telephone number.

(c) When signing a statement confirming your identity, you should understand that knowingly and willfully seeking or obtaining access to records about another person under false pretenses is punishable by a fine of up to \$5,000.

§ 505.5 Disclosure of information.

(a) In order to locate the system of records that you believe may contain information about you, you should first obtain a copy of the Agency's Notice of Systems of Records. By identifying a particular record system and by furnishing all the identifying information requested by that record system, it would enable us to more easily locate those records which pertain to you. At a minimum, any request should include the information specified in Sec. 505.4(b).

(b) In certain circumstances, it may be necessary for us to request additional information from you to ensure that the retrieved record does, in fact, pertain to you.

(c) All requests for information on whether or not the Agency's systems of records contain information about you will be acknowledged within 20 working days of receipt of that request. The requested records will be provided as soon as possible thereafter.

(d) If the Agency determines that the substance of the requested record is exceptionally sensitive, we will require you to furnish a signed, notarized statement that you are in fact the person named in the file before granting access to the records.

(e) Original records will not be furnished subject to and in accordance with fees established in § 505.11.

(f) Denial of access to records:

(1) The requirements of this section do not entitle you access to any information compiled in reasonable anticipation of a civil action or proceeding.

(2) Under the Privacy Act, we are not required to permit access to records if the information is not retrievable by your name or other personal identifier; those requests will be processed as Freedom of Information Act requests.

(3) We may deny you access to a record, or portion thereof, if following a review it is determined that the record or portion falls within a system of records that is exempt from disclosure according to 5 U.S.C. 552a(j) and 552a(k). See §§ 505.13 and 505.14 for a listing of general and specific exemptions.

(4) The decision to deny access to a record or a portion of the record is made by the Agency's Privacy Act Officer. The denial letter will advise you of your right to appeal the denial (See § 505.9 on Access Appeal Committee's review).

§ 505.6 Medical records.

If, in the judgment of the Agency, the release of medical information to you could have an adverse effect, the Agency will arrange an acceptable alternative to granting access of such records directly to you. This normally involves the release of the information to a doctor named by you. However, this special procedure provision does not in any way limit your absolute right to receive a complete copy of your medical record.

§ 505.7

§ 505.7 Correction or amendment of record.

(a) You have the right to request that we amend a record pertaining to you which you believe is not accurate, relevant, timely, or complete. At the time we grant access to a record, we will furnish guidelines for you to request amendment to the record.

(b) Requests for amendments to records must be in writing and mailed or delivered to the FOIA/Privacy Act Officer, FOIA/Privacy Act Office, Office of the General Counsel, Broadcasting Board of Governors, Suite 3349, 330 Independence Avenue, SW, Washington, DC 20237, who will coordinate the review of the request to amend the record with the appropriate office(s). Such requests must contain, at a minimum, identifying information needed to locate the record, a brief description of the item or items of information to be amended, and the reason for the requested change. The requester should submit as much documentation, arguments or other data as seems warranted to support the request for amendment.

(c) We will review all requests for amendments to records within 20 working days of receipt of the request and either make the changes or inform you of our refusal to do so and the reasons.

§ 505.8 Agency review of requests for changes.

(a) In reviewing a record in response to a request to amend or correct a file, we will incorporate the criteria of accuracy, relevance, timeliness, and completeness of the record in the review.

(b) If we agree with you to amend your records, we will:

- (1) Advise you in writing;
- (2) Correct the record accordingly;
- (3) And, to the extent that an accounting of disclosure was maintained, advise all previous recipients of the record of the corrections.

(c) If we disagree with all or any portion of your request to amend a record, we will:

- (1) Advise you of the reasons for the determination; and
- (2) Inform you of your right to further review (see Sec. 505.9).

22 CFR Ch. V (4–1–05 Edition)

§ 505.9 Review of adverse agency determination.

(a) When we determine to deny a request to amend a record, or portion of the record, you may request further review by the Agency's Access Appeal Committee. The written request for review should be mailed to the Chairperson, Access Appeal Committee, FOIA/Privacy Act Office, Office of the General Counsel, Broadcasting Board of Governors, Suite 3349, 330 Independence Avenue, SW., Washington, DC 20237. The letter should include any documentation, information or statement, which substantiates your request for review.

(b) The Agency's Access Appeal Committee will review the Agency's initial denial to amend the record and your documentation supporting amendment, within 30 working days. If additional time is required, you will be notified in writing of the reasons for the delay and the approximate date when the review is expected to be completed. Upon completion of the review, the Chairperson will notify you of the results.

(c) If the Committee upholds the Agency's denial to amend the record, the Chairperson will advise you of:

- (1) The reasons for our refusal to amend the record;
- (2) Your right and the procedure to add to the file a concise statement supporting your disagreement with the decision of the Agency; and
- (3) Your right to seek judicial review of the Agency's refusal to amend the file.

(d) When you file a statement disagreeing with our refusal to amend a record, we will clearly annotate the record so that the fact that the record is disputed is apparent to anyone who may subsequently have access to, use of, or reason to disclose the file. If information is disclosed regarding the area of dispute, we will provide a copy of your statement in the disclosure. Any statement, which may be included by the Agency regarding the dispute, will be limited to the reasons given to you for not amending the record. Copies of our statement shall be treated as part of your record, but will not be subject to amendment by you under these regulations.

Broadcasting Board of Governors

§ 505.11

§ 505.10 Disclosure to third parties.

We will not disclose any information about you to any person or another agency without your prior consent, except as provided for in the following paragraphs:

(a) *Medical records.* May be disclosed to a doctor or other medical practitioner, named by you, as prescribed in Sec. 505.6.

(b) *Accompanying individual.* When you are accompanied by any other person, we will require that you sign a statement granting consent to the disclosure of the contents of your record to that person.

(c) *Designees.* If a person requests another person's file, he or she must present a signed statement from the person of record that authorizes and consents to the release of the file to the designated individual.

(d) *Guardians.* Parents or legal guardians of dependent minors or of an individual who has been declared by a court to be incompetent due to physical, mental or age incapacity, may act for and on behalf of the individual on whom the Agency maintains records.

(e) *Other disclosures.* A record may be disclosed without a request by or written consent of the individual to whom the record pertains if such disclosure conditions are authorized in accordance, with 5 U.S.C. 552a(b). These conditions are:

(1) *Disclosure within the Agency.* This condition is based upon a "need-to-know" concept, which recognizes that Agency personnel may require access to discharge their duties.

(2) *Disclosure to the public.* No consent by an individual is necessary if the record is required to be released under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The record may be exempt, however, under one of the nine exemptions of the FOIA.

(3) *Disclosure for a routine use.* No consent by an individual is necessary if the condition is necessary for a "routine use" as defined in Sec. 505.2(g). Information may also be released to other government agencies, that have statutory or other lawful authority to maintain such information.

(4) *Disclosure to the Bureau of the Census.* For purposes of planning or carrying out a census or survey or related

activity. Title 13 U.S.C. Section 8 limits the uses of these records and also makes them immune from compulsory disclosure.

(5) *Disclosure for statistical research and reporting.* The Agency will provide the statistical information requested only after all names and personal identifiers have been deleted from the records.

(6) *Disclosure to the National Archives.* For the preservation of records of historical value, according to 44 U.S.C. 2103.

(7) *Disclosure for law enforcement purposes.* Upon receipt of a written request by another Federal agency or a state or local government describing the law enforcement purpose for which a record is required, and specifying the particular record. Blanket requests for all records pertaining to an individual are not permitted under the Privacy Act.

(8) *Disclosure under emergency circumstances.* For the safety or health of an individual (e.g., medical records on a patient undergoing emergency treatment).

(9) *Disclosure to the Congress.* For matters within the jurisdiction of any House or Senate committee or subcommittee, and/or joint committee or subcommittee, but only when requested in writing from the Chairman of the committee or subcommittee.

(10) *Disclosure to the General Accounting Office (GAO).* For matters within the jurisdiction of the duties of the GAO's Comptroller General.

(11) *Disclosure according to court order.* According to the order of a court of competent jurisdiction. This does not include a subpoena for records requested by counsel and issued by a clerk of court.

§ 505.11 Fees.

(a) The first copy of any Agency record about you will be provided free of charge. A fee of \$0.15 per page will be charged for any additional copies requested by you.

(b) Checks or money orders should be made payable to the United States Treasurer and mailed to the FOIA/Privacy Act Office, Office of the General

§ 505.12

22 CFR Ch. V (4–1–05 Edition)

Counsel, Broadcasting Board of Governors, Suite 3349, 330 Independence Avenue, SW., Washington, DC 20237. The Agency will not accept cash.

§ 505.12 Civil remedies and criminal penalties.

(a) *Grounds for court action.* You will have a remedy in the Federal District Court under the following circumstances:

(1) *Denial of access.* You may challenge our decision to deny you access to records to which you consider yourself entitled.

(2) *Refusal to amend a record.* Under the conditions of 5 U.S.C. 552a(g), you may seek judicial review of the Agency's refusal to amend a record.

(3) *Failure to maintain a record accurately.* You may bring suit against the Agency for any alleged intentional and willful failure to maintain a record accurately, if it can be shown that you were subjected to an adverse action resulting in the denial of a right, benefit, entitlement or employment you could reasonably have been expected to be granted if the record had not been deficient.

(4) *Other failures to comply with the Act.* You may bring an action for any alleged failure by the Agency to comply with the requirements of the Act or failure to comply with any rule published by the Agency to implement the Act provided it can be shown that:

(i) The action was intentional or willful;

(ii) The Agency's action adversely affected you; and

(iii) The adverse action was caused by the Agency's actions.

(b) *Jurisdiction and time limits.* (1) Action may be brought in the district court for the jurisdiction in which you reside or have a place of residence or business, or in which the Agency records are situated, or in the District of Columbia.

(2) The statute of limitations is two years from the date upon which the cause of action arises, except for cases in which the Agency has materially and willfully misrepresented any information requested to be disclosed and when such misrepresentation is material to the liability of the Agency. In such cases the statute of limitations is

two years from the date of discovery of the misrepresentation by you.

(3) A suit may not be brought on the basis of injury, which may have occurred as a result of the Agency's disclosure of a record prior to September 27, 1975.

(c) *Criminal penalties*—(1) *Unauthorized disclosure.* It is a criminal violation of the provisions of the Act for any officer or employee of the Agency to knowingly and willfully disclose a record in any manner to any person or agency not entitled to receive it, for failure to meet the conditions of disclosure listed in 5 U.S.C. 552a(b), or without the written consent or at the request of the individual to whom the record pertains. Any officer or employee of the Agency found guilty of such misconduct shall be fined not more than \$5,000.

(2) *Failure to publish a public notice.* It is a criminal violation of the Act to willfully maintain a system of records and not publish the prescribed public notice. Any officer or employee of the Agency found guilty of such misconduct shall be fined not more than \$5,000.

(3) *Obtaining records under false pretenses.* The Act makes it a criminal offense to knowingly and willfully request or gain access to a record about an individual under false pretenses. Any person found guilty of such an offense may be fined not more than \$5,000.

§ 505.13 General exemptions (Subsection (j)).

(a) General exemptions are available for systems of records which are maintained by the Central Intelligence Agency (Subsection (j)(1)), or maintained by an agency which performs as its principal function any activity pertaining to the enforcement of the criminal laws (Subsection (j)(2)).

(b) The Act does not permit general one exemption of records compiled primarily for a non-criminal purpose, even though there are some quasi-criminal aspects to the investigation and even though the records are in a system of records to which the general exemption applies.

Broadcasting Board of Governors

§ 506.2

§ 505.14 Specific exemptions (Subsection (k)).

The specific exemptions focus more on the nature of the records in the system of records than on the agency. The following categories of records may be exempt from disclosure:

(a) *Subsection (k)(1)*. Records which are specifically authorized under criteria established under an Executive Order to be kept secret in the interest of national defense or foreign policy, and which are in fact properly classified according to such Executive Order;

(b) *Subsection (k)(2)*. Investigatory records compiled for law enforcement purposes (other than material within the scope of subsection (j)(2) as discussed in §505.13(a)). If any individual is denied any right, privilege, or benefit for which she/he would otherwise be eligible, as a result of the maintenance of such material, the material shall be provided to the individual, unless disclosure of the material would reveal the identity of a source who has been pledged confidentiality;

(c) *Subsection (k)(3)*. Records maintained in connection with protection of the President and other VIPs accorded special protection by statute;

(d) *Subsection (k)(4)*. Records required by statute to be maintained and used solely as statistical records.

(e) *Subsection (k)(5)*. Records compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only if disclosure of the material would reveal the identity of a confidential source that furnished information to the Government.

(f) *Subsection (k)(6)*. Testing or examination records used solely to determine individual qualifications for appointment or promotion in the Federal service when the disclosure of such would compromise the objectivity or fairness of the testing or examination process.

(g) *Subsection (k)(7)*. Evaluation records used to determine potential for promotion in the armed services, but only if disclosure would reveal the identity of a confidential source.

§ 505.15 Exempt systems of records used.

The BBG is authorized to use exemptions (k)(1), (k)(2), (k)(4), (k)(5) and (k)(6).

PART 506—PART-TIME CAREER EMPLOYMENT PROGRAM

Sec.

506.1 Purpose of program.

506.2 Review of positions.

506.3 Establishing and converting part-time positions.

506.4 Annual goals and timetables.

506.5 Review and evaluation.

506.6 Publicizing vacancies.

506.7 Exceptions.

AUTHORITY: 5 U.S.C. 3401 (note and 3402).

SOURCE: 44 FR 63098, Nov. 2, 1979, unless otherwise noted.

§ 506.1 Purpose of program.

Many individuals in society possess great productive potential which goes unrealized because they cannot meet the requirements of a standard workweek. Permanent part-time employment also provides benefits to other individuals in a variety of ways, such as providing older individuals with a gradual transition into retirement, providing employment opportunities to handicapped individuals or others who require a reduced workweek, providing parents opportunities to balance family responsibilities with the need for additional income, providing employment opportunities for women returning to the workforce and assisting students who must finance their own education or vocational training. In view of this, the Broadcasting Board of Governors will operate a part-time career employment program, consistent with the needs of its beneficiaries and its responsibilities.

§ 506.2 Review of positions.

Positions becoming vacant unless excepted as provided by § 506.7, will be reviewed to determine the feasibility of converting them to part-time. Among the criteria which may be used when conducting this review are:

(a) Mission requirements and occupational mix.

(b) Workload fluctuations.

§ 506.3

- (c) Employment ceilings and budgetary considerations.
- (d) Size of workforce, turnover rate and employment trends.
- (e) Affirmative action.

§ 506.3 Establishing and converting part-time positions.

Position management and other internal reviews may indicate that positions may be either converted from full-time or initially established as part-time positions. Criteria listed above may be used during these reviews. If a decision is made to convert to or to establish a part-time position, regular position management and classification procedures will be followed.

§ 506.4 Annual goals and timetables.

A Board-wide plan for promoting part-time employment opportunities will be developed annually by the Office of Personnel after consultation with the operating elements. This plan will establish annual goals and set deadlines for achieving these goals.

[44 FR 63098, Nov. 2, 1979, as amended at 51 FR 11015, Apr. 1, 1986]

§ 506.5 Review and evaluation.

The part-time career employment program will be reviewed through semiannual reports submitted by the Director, Office of Personnel to the Associate Director for Management. Regular employment reports will be used to determine levels of part-time employment.

[44 FR 63098, Nov. 2, 1979, as amended at 51 FR 11016, Apr. 1, 1986]

§ 506.6 Publicizing vacancies.

When applicants from outside the Federal service are desired, part-time vacancies may be publicized through various recruiting means, such as:

- (a) Federal Job Information Centers.
- (b) State Employment Offices.
- (c) Broadcasting Board of Governors Vacancy Announcements.
- (d) College and University Placement Offices.

§ 506.7 Exceptions.

The Director of the Board and the Associate Director for Management may except positions from inclusion in

22 CFR Ch. V (4-1-05 Edition)

this program as necessary to carry out the mission of the Board.

PART 507—RULES FOR IMPLEMENTING OPEN MEETINGS UNDER THE SUNSHINE ACT FOR THE BROADCASTING BOARD OF GOVERNORS

Sec.

- 507.1 General policies.
- 507.2 Definitions.
- 507.3 Requirement for open meetings.
- 507.4 Grounds on which meetings may be closed.
- 507.5 Procedures for announcing meetings.
- 507.6 Procedures for closing meetings.
- 507.7 Reconsideration of opening or closing a meeting.
- 507.8 Recording keeping of closed meetings.

AUTHORITY: Pub. L. 93-129, 87 Stat. 956, 5 U.S.C. 552b.

SOURCE: 67 FR 76112, Dec. 11, 2002, unless otherwise noted.

§ 507.1 General policies.

The Broadcasting Board of Governors will provide the public with the fullest practical information regarding its decision making process while protecting the rights of individuals and its abilities to carry out its responsibilities.

§ 507.2 Definitions.

The following definitions apply:

(a) The term *agency* includes any establishment in the executive branch of the government headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency. The Broadcasting Board of Governors is a government agency headed by a nine-member board, eight of whom are appointed by the President with the advice and consent of the Senate, and the ninth being the Secretary of State. Therefore, the Broadcasting Board of Governors is an “agency” under these terms.

(b) The term *meeting* means the deliberation of this Board where such deliberations determine or result in the joint conduct or disposition of official Board business.

Broadcasting Board of Governors

§ 507.5

(c) The term *member* means an individual who belongs to the Board who has been appointed by the President and confirmed by the Senate or is the Secretary of State.

§ 507.3 Requirement for open meetings.

Members shall not jointly conduct or dispose of agency business other than in accordance with this part. Except as provided in § 507.4 every portion of every meeting of the agency shall be open to public observation.

§ 507.4 Grounds on which meetings may be closed.

The Board shall open every portion of every meeting of the agency for public observation except where the agency determines that such portion or portions of the meeting or the disclosure of such information is likely to:

- (a) Disclose matters that are:
 - (1) Specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy, and
 - (2) In fact properly classified pursuant to such Executive order;
- (b) Relate solely to the internal personnel rules and practice of the agency;
- (c) Disclose matters specifically exempted from disclosure by statute: Provided, that such statute:
 - (1) Requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or
 - (2) Established practical criteria for withholding or refers to particular types of matters to be withheld;
- (d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (e) Involve accusing any person of a crime, or formally censuring any person;
- (f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (g) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(1) Interfere with enforcement proceedings,

(2) Deprive a person of a right to a fair trial on an impartial adjudication,

(3) Constitute an unwarranted invasion of personal privacy,

(4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential source,

(5) Disclose investigative techniques and procedures, or

(6) Endanger the life or physical safety of law enforcement personnel;

(h) Disclose information, the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. This shall not apply in any instance where the Board has already disclosed to the public the content or the nature of its proposed action, or where the Board is required by law to make such disclosures on its own initiative prior to taking final Board action on such proposal; or

(i) Specifically concern the Board's issuance of a subpoena, or the Board's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct or disposition by the Board of a particular case of formal agency adjudication, or otherwise involving a determination on the record after opportunity for a hearing.

§ 507.5 Procedures for announcing meetings.

(a) In the case of each meeting, the Board shall make public, at least one week before the meeting, the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the Board to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the Board determine by a recorded vote that such meeting must be called at an earlier date, in which case the Board shall make public announcement of the

§ 507.6

time, place, subject matter of such meeting and whether it is open or closed to the public, at the earliest practical time.

(b) Immediately following the public announcement, the Board will publish it in the FEDERAL REGISTER.

§ 507.6 Procedures for closing meetings.

(a) The closing of a meeting shall occur only when:

(1) A majority of the membership of the Board votes to take such action. A separate vote of the Board members shall be taken with respect to each Board meeting, a portion or portions of which are proposed to be closed to the public pursuant to § 507.4, or with respect to any information which is proposed to be withheld under § 507.4. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held not more than thirty days after the initial meeting in such series. The vote of each Board member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interest may be directly affected by a portion of the meeting requests that the Board close such a portion to the public for any of the reasons referred to in § 507.4 (e), (f) or (g), the Board, upon request of any of its Board members, shall take a recorded vote, whether to close such portion of the meeting.

(b) Within one day of any vote taken, the Board shall make publicly available a written copy of such vote reflecting the vote of each member on the question and full written explanation of its action closing the entire or portion of the meeting together with a list of all persons expected to attend the meeting and their affiliation.

(c) The Board shall announce the time, place and subject matter of the meeting at least eight (8) days before the meeting.

(d) For every closed meeting, the Board's Legal Counsel shall publicly certify that, in his or her opinion, the

22 CFR Ch. V (4-1-05 Edition)

meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the Board.

§ 507.7 Reconsideration of opening or closing a meeting.

The time or place of a Board meeting may be changed following the public announcement only if the Board publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or a portion of a meeting, to the public, may be changed following the public announcement only if a majority of the Board members determines by a recorded vote that Board business so requires and that no earlier announcement of the change was possible, and the Board publicly announces such change and the vote of each member upon such change at the earliest practicable time.

§ 507.8 Recording keeping of closed meetings.

(a) The Board shall maintain an electronic recording of the proceedings of each meeting, or portion of a meeting, closed to the public.

(b) The Board, after review by the Chairman, shall make promptly available to the public in a place easily accessible to the public, a complete transcript or electronic record of the discussion of any item on the agenda, or any item of testimony of any witness received at the Board meeting, except for such item or items of such discussion or testimony as the Board determines to contain information which may be withheld under § 507.4. Copies of such record, disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication. The Board shall maintain a complete transcript or electronic copy of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Board proceeding with respect to

Broadcasting Board of Governors

§ 511.4

which the meeting or portion was held, whichever occurs later.

PART 510—SERVICE OF PROCESS

AUTHORITY: 5 U.S.C. 552(a)(1)(A).

§ 510.1 Service of process.

(a) The General Counsel of the Broadcasting Board of Governors or any of his/her designees shall act as agent for the receipt of legal process against the Broadcasting Board of Governors, as well as against employees of the Board to the extent that the process relates to the official functions of the employees.

(b) When accepting service of process for an employee in his/her official capacity, the General Counsel or his/her designee shall endorse on the server's return of process form, registered mail receipt, certified mail receipt, or express mail receipt: "Service accepted in official capacity only."

(c) Process shall be delivered to:

Mailing address: Office of the General Counsel, Broadcasting Board of Governors, 301 Fourth Street SW., Washington, DC 20547

Location: Office of the General Counsel, Broadcasting Board of Governors, 301 Fourth Street SW., Room 700 Washington, DC 20547.

[53 FR 50515, Dec. 16, 1988]

PART 511—FEDERAL TORT CLAIMS PROCEDURE

Sec.

511.1 Definitions.

511.2 Scope of regulations.

511.3 Exceptions.

511.4 Administrative claim; when presented.

511.5 Who may file claim.

511.6 Board authority to adjust, determine, compromise and settle claims and limitations upon that authority.

511.7 Investigations.

511.8 Limitations.

511.9 Supporting evidence.

511.10 Settlement of claim.

511.11 Acceptance of award.

511.12 When litigation is involved in claim.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 34 FR 20430, Dec. 31, 1969, unless otherwise noted.

§ 511.1 Definitions.

Board. Board means the Broadcasting Board of Governors.

Act. Act means the Federal Tort Claims Act, as amended, and codified in 28 U.S.C., sections 2671-2680.

§ 511.2 Scope of regulations.

The regulations in this part shall apply only to claims asserted under the Federal Tort Claims Act, as amended, or as incorporated by reference in any appropriation Act or other statutes, for money damages against the United States for injury, loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the Board while acting within the scope of his/her office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[43 FR 14301, Apr. 4, 1978]

§ 511.3 Exceptions.

Claims not compensable hereunder are listed in 2680 of the Act with the exception that 2680(k) (claims arising in a foreign country) has been removed by 22 U.S.C. 1474(5).

[44 FR 16374, Mar. 19, 1979]

§ 511.4 Administrative claim; when presented.

(a) For the purposes of the provisions of section 2672 of the Act and of this part, a claim shall be deemed to have been presented when the Board receives, in the office designated in paragraph (b) of this section, an executed "Claim for Damage or Injury", Standard Form 95, or other written notification of an incident, accompanied by a claim for money damages in a sum certain, for injury to or loss of property, personal injury or death, alleged to have occurred by reason of the incident. The claimant may, if he/she desires, file a brief with his/her claim setting forth the law or other arguments in support of his/her claim. In cases involving claims by more than one person arising from a single accident or incident, individual claim forms shall be used. A claim which should have been presented to the Board, but which

§511.5

was mistakenly addressed to or filed with another Federal Agency, shall be deemed to have been presented to the Board as of the date the claim is received by the Board. If a claim is mistakenly addressed to or filed with the Board, the Board shall transfer it forthwith to the appropriate Agency.

(b) A claimant shall mail, or deliver his/her claim to the Office of the General Counsel and Congressional Liaison, Broadcasting Board of Governors, 301 4th Street, SW., Washington, DC 20547.

[34 FR 20430, Dec. 31, 1969, as amended at 51 FR 11016, Apr. 1, 1986]

§511.5 Who may file claim.

(a) Claims for loss or damage of property may be filed by the owner of the property, or his/her legal representatives. Claims for personal injury or death may be made by the injured person or a legal representative of the injured or deceased person. The claim, if filed by a legal representative, should show the capacity of the person signing and be accompanied by evidence of this authority to act.

(b) The claim and all other papers requiring the signature of the claimant should be signed by him/her personally or by his/her representative. Signatures should be identical throughout.

§511.6 Board authority to adjust, determine, compromise, and settle claims and limitations upon that authority.

(a) The General Counsel of the Board, or his/her designee, is delegated authority to consider, ascertain, adjust, determine, compromise, and settle claims asserted under the provisions of section 2672 of the Act and under this part.

(b) Limitation on Board authority: An award, compromise, or settlement of a claim by the Board under the provisions of section 2672 of the Act, in excess of \$25,000, shall be effected only with the prior written approval of the Attorney General or his/her designee.

§511.7 Investigations.

The Board may request any other Federal agency to investigate a claim filed under section 2672 of the Act, or to conduct a physical or mental exam-

22 CFR Ch. V (4-1-05 Edition)

ination of the claimant and provide a report of such examination.

§511.8 Limitations.

(a) Pursuant to the provisions of section 2401(b) of title 28 of the United States Code, a tort claim against the United States shall be forever barred unless presented in writing to the Board within two (2) years after such claim accrues.

(b) A suit may not be filed until the claim shall have been finally denied by the Board. Failure of the Board to make final disposition of the claim within six (6) months after it has been presented shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of the Act and of this part.

(c) A suit shall not be filed for a sum greater than the amount of the claim presented to the Board, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time for presenting the claim to the Board, or upon allegation and proof of intervening facts, relating to amount of the claim.

§511.9 Supporting evidence.

(a) In support of claims for personal injury or death, the claimant should submit a written report by the attending physician. The report should show the nature and extent of injury, the nature and extent of treatment, the effect upon earning capacity, either temporarily or permanently, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation. Itemized bills for medical, hospital, or burial expenses actually incurred should be attached to report.

(b) In support of claims for damage to property which as been or can be economically repaired, the claimant should submit at least two itemized signed statements, or estimates by reliable, disinterested firms or itemized signed receipts if payment has been made.

(c) In support of claims for loss or damage to property which is not economically repairable, the claimant

should submit statements of the original cost of the property, date of purchase, and the value of the property before and after the accident together with a statement setting forth the basis used in arriving at such value. Such statements should be from at least two disinterested, competent persons, preferably reputable dealers or other qualified persons familiar with the type of property in question.

§ 511.10 Settlement of claim.

The General Counsel will review the findings from the standpoint of questions of law applicable to the claim and will determine disposition. The General Counsel will make final review for settlement of the claim and will sign SF-1145, Voucher for Payment Under Federal Tort Claims Act, and forward it to the Financial Operations Division for payment of claim. Payment of any award or settlement in the amount of \$2,500 or less will be authorized from the appropriation and allotment current for obligation on the date of settlement irrespective of when the cause of action arose. Payment of any award, compromise or settlement in an amount in excess of \$2,500, shall be paid in a manner similar to judgments and compromises out of the appropriation provided by section (c), Pub. L. 89-506 (28 U.S.C. 2672).

§ 511.11 Acceptance of award.

The acceptance by the claimant of any award will be final and conclusive on the claimant. The acceptance will constitute a complete release of any claim by reason of the same subject matter against the United States and against the employee whose act or omission resulted in the claim. Adjudication and payment shall likewise be conclusive on all officers of the United States, unless procured by fraud.

§ 511.12 When litigation is involved in claim.

If a claimant does not agree to a settlement of a claim of which is considered fair and equitable by the Board's responsible officials, the claimant, upon the final disposition thereof by the Board, may elect to file suit. Relief from claims which are disallowed may be sought by filing suit in the U.S. Dis-

trict Court for the district where the claimant resides or wherein the act of omission complained of occurred. The failure of the Board to make final disposition of a claim within 6 months after it has been filed shall, pursuant to 28 U.S.C. 2672, and at the option of the claimant at any time thereafter, is deemed a final denial of the claim. If a suit is filed against the Government involving the Board, the Department of Justice will request the Board to furnish the complete file on the case. The Office of the General Counsel will represent the Board in all negotiations with the Department of Justice.

PART 512—COLLECTION OF DEBTS UNDER THE DEBT COLLECTION ACT OF 1982

Subpart A—General Provisions

- Sec.
- 512.1 Definitions.
- 512.2 Exceptions.
- 512.3 Use of procedures.
- 512.4 Conformance to law and regulations.
- 512.5 Other procedures.
- 512.6 Informal action.
- 512.7 Return of property.
- 512.8 Omissions not a defense.

Subpart B—Administrative Offset and Referral to Collection Agencies

- 512.9 Demand for payment.
- 512.10 Collection by administrative offset.
- 512.11 Administrative offset against amounts payable for Civil Service Retirement and Disability Fund.
- 512.12 Collection in installments.
- 512.13 Exploration of compromise.
- 512.14 Suspending or terminating collection action.
- 512.15 Referrals to the Department of Justice or the General Accounting Office.
- 512.16 Collection services.

Subpart C—Salary Offset

- 512.17 Purpose.
- 512.18 Scope.
- 512.19 Definitions.
- 512.20 Notification.
- 512.21 Hearing.
- 512.22 Deduction from pay.
- 512.23 Liquidation from final check or recovery from other payment.
- 512.24 Non-waiver of rights by payments.
- 512.25 Refunds.
- 512.26 Interest, penalties, and administrative costs.

§ 512.1

512.27 Recovery when paying agency is not creditor agency.

Subpart D—Interest, Penalties, and Administrative Costs

512.28 Assessment.

512.29 Exemptions.

AUTHORITY: 31 U.S.C. 3701; 31 U.S.C. 3711 et seq.; 5 U.S.C. 5514; 4 CFR Parts 101–105; 5 CFR Part 550.

SOURCE: 52 FR 43897, Nov. 17, 1987, unless otherwise noted.

Subpart A—General Provisions

§ 512.1 Definitions.

(a) The term *Board* means the Broadcasting Board of Governors.

(b) The term *Board head* means the Director, Broadcasting Board of Governors.

(c) The term *appropriate Board official* or *designee* means the Chief, Financial Operations Division or such other official as may be named in the future by the Director, Broadcasting Board of Governors.

(d) The terms *debt* or *claim* refer to an amount of money which has been determined by an appropriate Board official to be owed to the United States from any person, organization or entity, except another Federal Agency.

(e) A debt is considered *delinquent* if it has not been paid by the date specified in the Board's written notification or applicable contractual agreement, unless other satisfactory arrangements have been made by that date, or at any time thereafter the debtor fails to satisfy obligations under a payment agreement with the Board.

(f) The term *referral for litigation* means referral to the Department of Justice for appropriate legal proceedings.

§ 512.2 Exceptions.

(a) Claims arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated, or settled in accordance with the regulations published under 31 U.S.C. 3726 (refer to 41 CFR part 101–41).

(b) Claims arising out of acquisition contracts subject to the Federal Acquisition Regulation (FAR) shall be deter-

22 CFR Ch. V (4–1–05 Edition)

mined, collected, compromised, terminated or settled in accordance with those regulations (see 48 CFR part 32). If not otherwise provided for in the FAR system, contract claims that have been the subject of a contracting officer's final decision in accordance with section 6(a) of the Contracts Disputes Act of 1978 (41 U.S.C. 605(a)), may be determined, collected, compromised, terminated, or settled under the provisions of this regulation, except no additional review of the debt shall be granted beyond that provided by the contracting officer in accordance with the provisions of section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605), and the amount of any interest, administrative charge, or penalty charge shall be subject to the limitations, if any, contained in the contract out of which the claim arose.

(c) Claims based in whole or in part on conduct in violation of the antitrust laws, or in regard to which there is an indication of fraud, presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be referred to the Department of Justice (DOJ) as only the DOJ has the authority to compromise, suspend or terminate collection action on such claims.

(d) Tax claims are excluded from the coverage of this regulation.

§ 512.3 Use of procedures.

Procedures authorized by this regulation (including but not limited to referral to a debt collection agency, administrative offset, or salary offset) may be used singly or in combination, providing the requirements of the applicable law and regulation are satisfied.

§ 512.4 Conformance to law and regulations.

(a) The requirements of applicable law (31 U.S.C. 3701–3719 as amended by Pub. L. 97–365, (96 Stat. 1749) have been implemented in Government-wide standards:

(1) The regulations of the Office of Personnel Management (5 CFR part 550).

Broadcasting Board of Governors

§512.9

(2) The Federal Claims Collection Standards issued jointly by the General Accounting Office and the Department of Justice (4 CFR parts 101-105), and

(3) The procedures prescribed by the Office of Management and Budget in Circular A-129 of May 9, 1985.

(b) Not every item in the above described standards has been incorporated or referenced in this regulation. To the extent, however, that circumstances arise which are not covered by the terms stated in this regulation, Broadcasting Board of Governors will proceed in any actions taken in accordance with applicable requirements found in the sources referred to in paragraphs (a)(1), (2), and (3) of this section.

§512.5 Other procedures.

Nothing contained in this regulation is intended to require Broadcasting Board of Governors to duplicate administrative proceedings required by contract or other laws or regulations.

§512.6 Informal action.

Nothing in this regulation is intended to preclude utilization of informal administrative actions or remedies which may be available.

§512.7 Return of property.

Nothing contained in this regulation is intended to deter Broadcasting Board of Governors from demanding the return of specific property or from demanding the return of the property or the payment of its value.

§512.8 Omissions not a defense.

The failure of Broadcasting Board of Governors to comply with any provision in this regulation shall not serve as a defense to the debt.

Subpart B—Administrative Offset and Referral to Collection Agencies

§512.9 Demand for payment.

Prior to initiating administrative offset, demand for payment will be made as follows:

(a) Written demands will be made promptly upon the debtor in terms

which inform the debtor of the consequences of failure to cooperate. A total of three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that further demand would be futile and the debtor's response does not require rebuttal. In determining the timing of demand letters, Broadcasting Board of Governors will give due regard to the need to act promptly so that, as a general rule, debt referrals to the Department of Justice for litigation, where necessary, can be made within one year of the Board's final determination of the fact and the amount of the debt. When necessary to protect the Government's interests (e.g., to prevent the statute of limitations, 28 U.S.C. 2415, from expiring) written demand may be preceded by other appropriate actions under this chapter, including immediate referral for litigation.

(b) The initial demand letter will inform the debtor of: The basis for the indebtedness and the right of the debtor to request review within the Board; the applicable standards for assessing interest, penalties, and administrative costs (Supart D of this regulation) and; the date by which payment is to be made, which normally will not be more than 30 days from the date that the initial demand letter was mailed or hand delivered. Broadcasting Board of Governors will exercise care to insure that demand letters are mailed or hand-delivered on the same day that they are actually dated.

(c) As appropriate to the circumstances, Broadcasting Board of Governors will include in the demand letters matters relating to alternative methods of payment, the debtor's rights to representation by his respective bargaining unit, policies relating to referral to collection agencies, the Board's intentions relative to referral of the debt to the Department of Justice for litigation, and, depending on the statutory authority, the debtor's entitlement to consideration of waiver.

(d) Broadcasting Board of Governors will respond promptly to communications from the debtor and will advise debtors who dispute the debt that they

must furnish available evidence to support their contention.

§ 512.10 Collection by administrative offset.

(a) Collection by administrative offset will be undertaken in accordance with these regulations on all claims which are liquidated and certain in amount, in every instance where the appropriate Board official determines such collection to be feasible and not otherwise prohibited.

(1) For purpose of this section, the term *administrative offset* has the same meaning as provided in 31 U.S.C. 3716(a)(1).

(2) Whether collection by administrative offset is feasible is a determination to be made by the Board on a case-by-case basis, in the exercise of sound discretion. Broadcasting Board of Governors will consider not only the practicalities of administrative offset, but whether such offset is best suited to protect and further all of the Government's interests. Broadcasting Board of Governors will give consideration to the debtor's financial condition, and is not required to use offset in every instance where there is an available source of funds. Broadcasting Board of Governors will also consider whether offset would tend to substantially disrupt or defeat the purpose of the program authorizing the payments against which offset is contemplated.

(b) Before the offset is made, a debtor shall be provided with the following: written notice of the nature and the amount of the debt and the Board's intention to collect by offset; opportunity to inspect and copy Board records pertaining to the debt; opportunity to obtain review within the Board of the determination of indebtedness; and opportunity to enter into written agreement with the Board to repay the debt. Broadcasting Board of Governors may also make requests to other agencies holding funds payable to the debtor, and process requests for offset that are received from other agencies.

(1) Broadcasting Board of Governors will exercise sound judgment in determining whether to accept a repayment agreement in lieu of offset. The determination will weigh the Government's

interest in collecting the debt against fairness to the debtor.

(2) In cases where the procedural requirements specified in this paragraph (b) have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, such as pursuant to an audit allowance, the Board is not required to duplicate those requirements before taking administrative offset.

(3) Broadcasting Board of Governors may not initiate administrative offset to collect a debt more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right were not known and could not reasonably have been known by the official or officials of the Government who were charged with the responsibility to discover and collect the debt. When the debt first accrued is to be determined according to existent law regarding the accrual of debts (e.g., 28 U.S.C. 2415).

(4) Broadcasting Board of Governors is not authorized by 31 U.S.C. 3716 to use administrative offset with respect to: Debts owed by any State or local Government; debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954 or the tariff laws of the United States; or any case in which collection of the type of debt involved by administrative offset is explicitly provided for or prohibited by another statute. Unless otherwise provided by contract or law, debts or payments which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(5) Broadcasting Board of Governors may effect administrative offset against a payment to be made to a debtor prior to completion of the procedures required by paragraph (b) of this section if failure to take offset would substantially prejudice the Government's ability to collect the debt, and the time before the payment is to be made does not reasonably permit the completion of those procedures. Amounts recovered by offset but later determined not to be owed to the Government shall be promptly refunded 30

Broadcasting Board of Governors

§ 512.11

days after the Board has notified the debtor in writing that the debt is not owed. Such written notification will be issued within 15 days after the Board has confirmed through a review of its official records that the debt is not owed.

(c) Type of hearing or review: (1) For purposes of this section, whenever Broadcasting Board of Governors is required to afford a hearing or review within the Board, the Board will provide the debtor with a reasonable opportunity for an oral hearing when: An applicable statute authorizes or requires the Board to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of veracity; or the debtor requests reconsideration of the debt and the Board determines that the question of the indebtedness cannot be resolved by review of the documentary evidence. Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary type hearing.

(2) This section does not require an oral hearing with respect to debt collection systems in which determinations of indebtedness or waiver rarely involve issues of veracity and the Board has determined that the review of the written record is ordinarily enough to correct prior mistakes.

(3) In those cases where an oral hearing is not required by this section, the Board will make its determination on the request for waiver or reconsideration based upon a review of the written record.

(d) Appropriate use will be made of the cooperative efforts of other agencies in effecting collection by administrative offset. Broadcasting Board of Governors will not refuse to initiate administrative offset to collect debts owed the United States, unless the requesting agency has not complied with the applicable provisions of these standards.

(e) Collection by offset against a judgment obtained against the United States shall be accomplished in accordance with 31 U.S.C. 3728.

(f) Whenever the creditor agency is not the agency which is responsible for making the payment against which off-

set is sought, the latter agency shall not initiate the requested offset until it has been provided by the creditor agency with an appropriate written certification that the debtor owes the debt (including the amount) and that full compliance with the provisions of this section has taken place.

(g) When collecting multiple debts by administrative offset, Broadcasting Board of Governors will apply the recovered amounts to those debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying particular attention to the applicable statutes of limitations.

§ 512.11 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

(a) Unless otherwise prohibited by law, Broadcasting Board of Governors may request that monies that are due and payable to a debtor from the Civil Service Retirement and Disability Fund be administratively offset in reasonable amounts in order to collect in one full payments, or a minimal number of payment, debts owed the United States by the debtor. Such requests shall be made to the appropriate officials within the Office of Personnel Management in accordance with such regulations as may be prescribed by the Director of that Office.

(b) When making a request for administrative offset under paragraph (a) of this section, Broadcasting Board of Governors shall include written statements that:

(1) The debtor owes the United States a debt, including the amount of the debt;

(2) The Broadcasting Board of Governors has complied with the applicable statutes, regulations, and procedures of the Office of Personnel Management; and

(3) The Broadcasting Board of Governors has complied with the requirements of § 512.10 of this part, including any required hearing or review.

(c) Once Broadcasting Board of Governors decides to request offset under paragraph (a) of this section, it will make the request as soon as practical

§512.12

22 CFR Ch. V (4–1–05 Edition)

after completion of the applicable procedures in order that the Office of Personnel Management may identify the debtor's account in anticipation of the time when the debtor requests or becomes eligible to receive payments from the Fund. This will satisfy any requirement that offset be initiated prior to expiration of the applicable statute of limitations.

(d) If Broadcasting Board of Governors collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, Broadcasting Board of Governors shall act promptly to modify or terminate its request for offset under paragraph (a) of this section.

(e) This section does not require or authorize the Office of Personnel Management to review the merits of the Broadcasting Board of Governors determination relative to the amount and validity of the debt, its determination on waiver under an applicable statute, or its determination whether to provide an oral hearing.

§512.12 Collection in installments.

(a) Whenever feasible, and except as required otherwise by law, debts owed to the United States, together with interest, penalties, and administrative costs as required by this regulation, should be collected in one lump sum. This is true whether the debt is being collected under administrative offset or by another method, including voluntary payment. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments. If Broadcasting Board of Governors agrees to accept payment in installments, it will obtain a legally enforceable written agreement from the debtor that specifies all of the terms of the arrangement and which contains a provision accelerating the debt in the event the debtor defaults. The size and frequency of the payments should bear a reasonable relation to the size of the debt and ability to the debtor to pay. If possible the installment payments should be sufficient in size and frequency to liquidate the Government's claim within 3 years.

(b) If the debtor owes more than one debt and designates how a voluntary installment plan is to be applied among those debts, the Board will follow that designation. If no such designation is made, the Board will apply payments to the various debts in accordance with the best interest of the United States as as determined by the facts and circumstances of each case, with particular attention to application statutes of limitation.

§512.13 Exploration of compromise.

Broadcasting Board of Governors may attempt to effect compromise in accordance with the standards set forth in part 103 of the Federal Claims Collection Standards (4 CFR part 103).

§512.14 Suspending or terminating collection action.

The suspension or termination of collection action shall be made in accordance with the standards set forth in part 104 of the Federal Claims Collection Standard (4 CFR part 104).

§512.15 Referrals to the Department of Justice or the General Accounting Office.

Referrals to the Department of Justice or the General Accounting Office shall be made in accordance with the standards set forth in part 105 of the Federal Claims Collection Standards (4 CFR part 105).

§512.16 Collection services.

(a) Broadcasting Board of Governors has authority to contract for collection services to recover delinquent debts in accordance with 31 U.S.C. 3718(c) and 4 CFR 102.6.

(b) Contracts with collection agencies will provide that:

(1) The authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the matter to the Justice Department for litigation will be retained by Broadcasting Board of Governors;

(2) Contractors are subject to 5 U.S.C. 552a, the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m) and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as

Broadcasting Board of Governors

§ 512.19

the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(3) The contractor is required to strictly account for all amounts collected;

(4) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable Broadcasting Board of Governors to determine whether to pursue collection through litigation or to terminate collection;

(5) The contractor must agree to provide any data in its files relating to paragraphs (a)(1), (2), and (3) of § 105.2 of the Federal Claims Collection Standards (4 CFR part 105) upon returning the account to Broadcasting Board of Governors for subsequent referral to the Department of Justice for litigation.

(c) Broadcasting Board of Governors will not use a collection agency to collect a debt owed by a currently employed or retired Federal employee, if collection by salary or annuity offset is available.

Subpart C—Salary Offset

§ 512.17 Purpose.

This subpart provides the standards to be followed by Broadcasting Board of Governors in implementing 5 U.S.C. 5514 to recover a debt from the pay of an Board employee or former employee, and establishes the procedural guidelines to recover debts when the employee's creditor and paying agencies are not the same.

[52 FR 43897, Nov. 17, 1987, as amended at 55 FR 3050, Jan. 30, 1990]

§ 512.18 Scope.

(a) *Coverage.* This subpart applies to Executive agencies, military departments, an agency or court in the judicial branch, an agency of the legislative branch and other independent entities of the Federal Government as defined in 5 CFR 550.1103, under the heading "Agency".

(b) *Applicability.* This subpart and 5 U.S.C. 5514 apply in recovering debts by offset without the employee's consent from the current pay of that employee. Debt collection procedures which are not specified in 5 U.S.C. 5514 and these

regulations will be consistent with the Federal Claims Collection Standards (4 CFR parts 101-105).

(1) The procedures contained in this subpart do not apply to debts or claims arising under the Internal Revenue Code of 1954 as amended (26 U.S.C. 1 et seq.), the Social Security Act (42 U.S.C. 301 et seq.), or the tariff laws of the United States or to any case where collection of a debt is explicitly provided for or prohibited by another statute (e.g., travel advances in 5 U.S.C. 5705).

(2) This subpart does not preclude an employee from requesting a waiver of a salary overpayment under 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, or in any way questioning the amount or validity of a debt by submitting a subsequent claim to the General Accounting Office in accordance with procedures prescribed by the General Accounting Officer, nor does it preclude an employee from requesting waiver when waiver is available under any statutory provision.

[52 FR 43897, Nov. 17, 1987, as amended at 55 FR 3051, Jan. 30, 1990]

§ 512.19 Definitions.

For purposes of this subpart:

Board means the Broadcasting Board of Governors.

Creditor Agency means the agency to which the debt is owed.

Debt means an amount owed to the United States.

Disposable Pay means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay or authorized pay remaining after the deduction of any amount required to be withheld by law. The Board will exclude deductions described in 5 CFR 581.105 (b) through (f) to determine disposable pay subject to salary offset.

Employee means a current employee of Broadcasting Board of Governors or of another Executive Agency.

Executive Agency means:

(a) An Executive Agency as defined in section 105 of title 5, United States Code, including the U.S. Postal Service and the U.S. Postal Rate Commission;

(b) A military department as defined in section 102 of title 5, United States Code;

(c) An agency or court in the judicial branch, including a court as defined in

§ 512.20

22 CFR Ch. V (4-1-05 Edition)

section 610 of title 28, United States Code, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multidistrict Litigation;

(d) An agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and

(e) Other independent establishments that are entities of the Federal Government.

FCCS means the Federal Claims Collection Standards jointly published by the Justice Department and the General Accounting Office at 4 CFR parts 101-105.

Paying agency means the agency employing the individual and authorizing the payment of his or her current pay.

Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deductions at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

Waiver means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as permitted or required by U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 710, 5 U.S.C. 8346(b), or any other law.

[52 FR 43897, Nov. 17, 1987, as amended at 55 FR 3051, Jan. 30, 1990]

§ 512.20 Notification.

(a) Salary offset deductions shall not be made unless the Director, Financial Operations Division of Broadcasting Board of Governors, or such other official as may be named in the future by the Director of Broadcasting Board of Governors, provides to the employee a written notice, 30 calendar days prior to any deduction, stating at a minimum:

(1) The Board's determination that a debt is owed including the nature, origin, and amount of the debt;

(2) The Board's intent to collect the debt by means of deduction from the employee's current disposable pay account;

(3) The amount, frequency and proposed beginning date and duration of the intended deductions;

(4) An explanation of the Board's policy concerning interest, penalties, and administrative costs;

(5) The employee's right to inspect and copy Government records pertaining to the debt;

(6) The opportunity to establish a schedule for the voluntary repayment of the debt or to enter into a written agreement to establish a schedule for repayment in lieu of offset per the requirements of 4 CFR 102.2(e).

(7) The employee's right to a hearing arranged by the Board and conducted by an administrative law judge or, alternatively, an official not under the control of the head of the Board;

(8) The method and time period for filing a petition for a hearing;

(9) That timely filing of the petition will stay the commencement of collection proceedings;

(10) That final decision on the hearing will be issued not later than 60 days after the filing of the petition for hearing unless the employee requests and the hearing officer grants a delay in the proceedings.

(11) That knowingly false, misleading, or frivolous statements, representations or evidence may subject the employee to:

(i) Disciplinary procedures under chapter 75 of title 5, United States Code or any other applicable statutes;

(ii) Penalties under the False Claims Act, sections 3729-3731 of title 31 U.S.C. or any other applicable statutes.

(iii) Criminal penalties under sections 286, 287, 1001, 1002 of title 18 United States Code or any other applicable statutes.

(12) Any other rights or remedies available to the employee, including representation by counsel or his respective bargaining unit, under the statutes or regulations governing the program for which collection is being made.

(13) That amounts paid on or deducted for the debts that are later waived or found not owed to the United States will be promptly refunded to the employee.

(b) Notifications under this section shall be hand delivered with a record made of the delivery, or shall be mailed certified mail with return receipt requested.

(c) No notification hearing, written responses or final decisions under this regulation are required of Broadcasting

Broadcasting Board of Governors

§ 512.23

Board of Governors for any adjustment to pay arising from an employee's election of coverage under a Federal benefit program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

§ 512.21 Hearing.

(a) *Petition for hearing.* (1) A hearing may be requested by filing a written petition with the Director, Financial Operations Division of Broadcasting Board of Governors, or such other official as may be named in the future by the Director of Broadcasting Board of Governors, stating why the employee believes the Board's determination of the existence or amount of the debt is in error.

(2) The petition must be signed by the employee and fully identify and explain with reasonable specificity all the facts, evidence and witnesses which the employee believes support his or her position.

(3) The petition must be filed no later than fifteen (15) calendar days from the date the notification under § 512.20(b) was hand delivered or the date of delivery by certified mail.

(4) Where petition is received after the 15 calendar day limit, Broadcasting Board of Governors will accept the petition if the employee can show that the delay was beyond his or her control or because of failure to receive notice.

(5) If the petition is not filed within the time limit, and is not accepted pursuant to paragraph (a)(4) of this section, the employee's right to hearing will be considered waived, and salary offset will be implemented.

(b) *Type of hearing.* (1) The form and content of the hearing will be determined by the hearing official who shall be a person outside the control or authority of Broadcasting Board of Governors.

(2) The employee may represent him or herself, or may be represented by counsel.

(3) The hearing official shall maintain a summary record of the hearing.

(4) The hearing official will prepare a written decision which will state:

(i) The facts purported to evidence nature and origin of the alleged debt;

(ii) The hearing official's analysis, findings, and conclusions relative to:

(A) The employee's and/or the Board's grounds;

(B) The amount and the validity of the alleged debt;

(C) The repayment schedule, if applicable.

(5) The decision of the hearing official shall constitute the final administrative decision of the Board.

§ 512.22 Deduction from pay.

(a) Deduction by salary offset, from an employee's disposable current pay, shall be subject to the following circumstances:

(1) When funds are available, the Board will collect debts owed the United States in full in one lump-sum. If funds are not available or the debt exceeds 15% of disposable pay for an officially established pay interval, collection will normally be made in installments.

(2) The installments shall not exceed 15% of the disposable pay from which the deduction is made, unless the employee has agreed in writing to a larger amount.

(3) Deduction will commence with the next full pay interval following notice that deductions will commence.

(4) Installment deductions will not be made over a period greater than the anticipated period of employment.

[52 FR 43897, Nov. 17, 1987, as amended at 55 FR 3051, Jan. 30, 1990]

§ 512.23 Liquidation from final check or recovery from other payment.

(a) If an employee retires or resigns before collection of the debt is completed, offset of the entire remaining balance may be made from a final payment of any nature to such extent as is necessary to liquidate the debt.

(b) Where debt cannot be liquidated by offset from final payment, offset may be made from later payments of any kind due from the United States inclusive of Civil Service Retirement and Disability Fund pursuant to 5 U.S.C. 8347 and 5 CFR 831.1801 *et seq* of this regulation.

[52 FR 43897, Nov. 17, 1987, as amended at 55 FR 3051, Jan. 30, 1990]

§ 512.24

§ 512.24 Non-waiver of rights by payments.

An employee's voluntary payment of all or part of a debt being collected under 5 U.S.C. 5514 shall not be construed as a waiver of any rights which the employee may have under 5 U.S.C., or any other provision of contract or law, unless statutory or contractual provisions provide to the contrary.

§ 512.25 Refunds.

(a) Refunds shall be promptly made when:

(1) A debt is waived or otherwise found not to be owed to the United States; or

(2) The employee's paying agency is directed by an administrative or judicial order to refund amounts deducted from his or her current pay.

(b) Refunds do not bear interest unless required or permitted by law or contract.

§ 512.26 Interest, penalties, and administrative costs.

The assessment of interest, penalties and administrative costs shall be in accordance with subpart D of this regulation.

§ 512.27 Recovery when paying agency is not creditor agency.

(a) *Format for request for recovery.* (1) Upon completion of the procedures prescribed under 5 CFR 550.1104 and its own regulations, the creditor agency shall certify the debt in writing to the paying agency.

(2) The creditor agency shall certify in writing that the employee owes the debt, the amount and basis of the debt; the date on which payment is due, the date the Government's right to collect first accrued, and that the creditor agency's regulations implementing section 5514 have been approved by OPM.

(3) If collection must be made in installments, the creditor agency must advise the paying agency of the number of installments to be collected, the amount of each installment, and the commencing date of the first installment.

(b) *Submitting the request for recovery.*—(1) *Current employees.* The creditor agency shall submit the debt claim, agreement, or other instruction on the

22 CFR Ch. V (4–1–05 Edition)

payment schedule to the employee's paying agency.

(2) *Separated employees.*—(i) *Employees who are in the process of separating.* If the employee is in the process of separating, the creditor agency will submit its debt claim to the employee's paying agency for collection as provided in §§ 512.22 and 512.23. The paying agency shall certify the total amount of its collection and notify the creditor agency and the employee as provided in paragraph (b)(2)(iii) of this section. Where the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, it will send a copy of the certified debt claim to the agency responsible for making such payments as notice that a debt is outstanding. It is the responsibility of the creditor agency for pursuing the claim.

(ii) *Employees who have already separated.* If the employee is already separated and all payments due from his or her former paying agency have been paid, the creditor agency may request that monies which are due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801) or other similar funds be administratively offset in order to collect the debt (31 U.S.C. 3716 and the FCCS).

(iii) *Employees who transfer from one paying agency to another.* If an employee transfers to a position served by a different paying agency subsequent to the creditor agency's debt claim but before complete collection, the paying agency from which the employee separates shall certify the total of collection made on the debt. One copy of the certification will be supplied to the employee, and another to the creditor agency with notice of the employee's transfer. The original shall be inserted in the employee's official personnel folder. The creditor agency shall submit a properly certified claim to the new paying agency before collection can be resumed. The paying agency will then resume collection from the employee's current pay account, and notify the employee and the creditor agency of the resumption. The creditor agency will not need to repeat the due process procedure described by 5 U.S.C. 5514 and 5 CFR 550.1101 *et seq.* Upon settlement or repayment of the debt all

Broadcasting Board of Governors

§ 512.28

records of the debt will be removed from official personnel records.

(c) Processing the debt claim upon receipt by the paying agency:

(1) *Incomplete claims.* If the paying agency receives an improperly completed debt certification, it shall return the request with a notice that procedures under 5 CFR 550.1101 *et seq.* and the creditor agency's own regulations must be completed and a properly completed debt certification form received before action will be taken to effect collection.

(2) *Complete claim.* If the paying agency receives a properly completed debt form, deductions will begin prospectively at the next officially established pay interval. A copy of the debt form will be given to the debtor along with notice of the date deductions will commence.

(3) The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt as stated in the debt claim.

[52 FR 43897, Nov. 17, 1987, as amended at 55 FR 3051, Jan. 30, 1990]

Subpart D—Interest, Penalties, and Administrative Costs

§ 512.28 Assessment.

(a) Except as provided in paragraph (h) of this section, or § 512.29, Broadcasting Board of Governors shall assess interest, penalties, and administrative costs on debts owed to the United States pursuant to 31 U.S.C. 3717. Before assessing these charges, Broadcasting Board of Governors will mail or hand deliver a written notice to the debtor. This notice will include a statement of the Board's requirements concerning §§ 512.9 and 512.21.

(b) Interest shall accrue from the date on which notice of the debt is first mailed or hand-delivered to the debtor, using the most current address available to the Board.

(c) The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury (i.e., the Treasury Tax and Loan account rate), as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treas-

ury Fiscal Requirements Manual Bulletins annually or quarterly, in accordance with 31 U.S.C. 3717. The rate of interest as initially assessed shall remain fixed for the duration of the indebtedness. However, in cases where the debtor has defaulted on a repayment agreement and seeks a new agreement, Broadcasting Board of Governors may set a new rate which reflects the current value of funds to the Treasury at the time the agreement is executed. Interest will not be assessed on interest, penalties, or administrative costs required by this section.

(d) Broadcasting Board of Governors shall assess charges to cover administrative costs incurred as a result of a delinquent debt. Calculation of administrative costs shall be based upon actual costs incurred. Administrative costs include costs incurred to obtain credit reports in the case of employee debt or in using a private debt collector in the case of non-employee debt.

(e) Broadcasting Board of Governors shall assess a penalty charge not to exceed 6% per year on any portion of a debt that is delinquent for more than 90 days. This charge need not be calculated until the 91st day of delinquency, but shall accrue from the date that the debt became delinquent.

(f) When a debt is paid in partial or installment payments, amounts received shall be applied first to the outstanding penalty and administrative cost charges, second to accrued interest and third to outstanding principal.

(g) Broadcasting Board of Governors will waive the collection of interest on the debt or any portion of the debt that is paid within 30 days after the date on which interest began to accrue. Broadcasting Board of Governors may extend this 30-day period, on a case-by-case basis, if it reasonably determines such action is appropriate. Broadcasting Board of Governors may also waive in whole or in part the collection of interest, penalties, and administrative costs assessed under this section per the criteria specified in part 103 of the Federal Claims Collection Standards (4 CFR part 103) relating to the compromise of claims or if the Board determines that collection of these charges is not in the best interest of the United

§ 512.29

States. Waiver under the first sentence of this paragraph is mandatory. Under the second and third sentences, it may be exercised under the following circumstances:

(1) Waiver of interest pending consideration of a request for reconsideration, administrative review, or waiver of the underlying debt under a permissive statute, and

(2) Waiver of interest where Broadcasting Board of Governors has accepted an installment plan under § 512.12, there is no indication of fault or lack of good faith on the part of the debtor and the amount of the interest is large enough, in relation to the size of the installments that the debtor can reasonably afford to pay, that the debt will never be repaid.

(h) Where a mandatory waiver or review statute applies, interest and related charges may not be assessed for those periods during which collection must be suspended under § 104.2(c)(1) of the Federal Claims Collection Standards (4 CFR part 104).

§ 512.29 Exemptions.

(a) The provisions of 31 U.S.C. 3717 do not apply—

(1) To debts owned by any State or local government;

(2) To debt arising under contracts which were executed prior to, and were in effect on October 25, 1982;

(3) To debts where an applicable statute, loan agreement, or contract either prohibits such charges or explicitly fixes the charges that apply to the debts arising under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

(b) However Broadcasting Board of Governors is authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

22 CFR Ch. V (4–1–05 Edition)

PART 513—GOVERNMENT DEBARMENT AND SUSPENSION (NON-PROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Subpart A—General

Sec.

513.100 Purpose.

513.105 Definitions.

513.110 Coverage.

513.115 Policy.

Subpart B—Effect of Action

513.200 Debarment or suspension.

513.205 Ineligible persons.

513.210 Voluntary exclusion.

513.215 Exception provision.

513.220 Continuation of covered transactions.

513.225 Failure to adhere to restrictions.

Subpart C—Debarment

513.300 General.

513.305 Causes for debarment.

513.310 Procedures.

513.311 Investigation and referral.

513.312 Notice of proposed debarment.

513.313 Opportunity to contest proposed debarment.

513.314 Debarring official's decision.

513.315 Settlement and voluntary exclusion.

513.320 Period of debarment.

513.325 Scope of debarment.

Subpart D—Suspension

513.400 General.

513.405 Causes for suspension.

513.410 Procedures.

513.411 Notice of suspension.

513.412 Opportunity to contest suspension.

513.413 Suspending official's decision.

513.415 Period of suspension.

513.420 Scope of suspension.

Subpart E—Responsibilities of GSA, Board and Participants

513.500 GSA responsibilities.

513.505 Broadcasting Board of Governors responsibilities.

513.510 Participants' responsibilities.

Subpart F—Drug-Free Workplace Requirements (Grants)

513.600 Purpose.

513.605 Definitions.

513.610 Coverage.

Broadcasting Board of Governors

§513.105

513.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

513.620 Effect of violation.

513.625 Exception provision.

513.630 Certification requirements and procedures.

513.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

APPENDIX A TO PART 513—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

APPENDIX B TO PART 513—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

APPENDIX C TO PART 513—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: 40 U.S.C. 486 (c); 41 U.S.C. 701 *et seq.*; Sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); E. O. 12549, 3 CFR, 1986 Comp., p. 189; E.O. 12689, 3 CFR, 1989 comp., p. 235.

SOURCE: 53 FR 19179, 19204, May 26, 1988, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990, and 60 FR 33036, June 26, 1995.

Subpart A—General

§513.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of “ineligible” in §513.105), and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103-355, sec. 2455, 108 Stat. 3327) by—

(1) Providing for the inclusion in the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

[60 FR 33040, 33045, June 26, 1995]

§513.105 Definitions.

The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of

employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is “debarred.”

Debarring official. An official authorized to impose debarment. The debarring official is either:

- (1) The agency head, or
- (2) An official designated by the agency head.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility

to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9, subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the Board.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with

Broadcasting Board of Governors

§513.110

that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered trans-

actions assumed by a person pursuant to the terms of a settlement.

Broadcasting Board of Governors.

[53 FR 19204, 19179, May 26, 1988, as amended at 60 FR 33041, 33045, June 26, 1995]

§513.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant

§513.115

and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

- (1) Principal investigators.
- (2) Providers of federally-required audit services.
- (2) *Exceptions.* The following transactions are not covered:
 - (i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;
 - (ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;
 - (iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);
 - (iv) Federal employment;
 - (v) Transactions pursuant to national or agency-recognized emergencies or disasters;
 - (vi) Incidental benefits derived from ordinary governmental operations; and
 - (vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," 513.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in 513.110(a). Sections 513.325, "Scope of debarment," and 513.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which

22 CFR Ch. V (4-1-05 Edition)

affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* In accordance with E.O. 12689 and section 2455 of Public Law 103-355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

[53 FR 19179, 19204, May 26, 1988, as amended at 60 FR 33041, 33045, June 26, 1995]

§513.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B—Effect of Action

§513.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended

Broadcasting Board of Governors

§ 513.220

shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to § 513.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 513.110(a)(1)(ii)) for the period of their exclusion.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

[60 FR 33041, 33045, June 26, 1995]

§ 513.205 Ineligible persons.

Persons who are ineligible, as defined in § 513.105(i), are excluded in accord-

ance with the applicable statutory, executive order, or regulatory authority.

§ 513.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 513.315 are excluded in accordance with the terms of their settlements. Broadcasting Board of Governors shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 513.215 Exception provision.

may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 513.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 513.505(a).

[60 FR 33041, 33045, June 26, 1995]

§ 513.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntarily excluded, except as provided in § 513.215.

[60 FR 33041, 33045, June 26, 1995]

§ 513.225

22 CFR Ch. V (4–1–05 Edition)

§ 513.225 Failure to adhere to restrictions.

(a) Except as permitted under § 513.215 or § 513.220, a participant shall not knowingly do business under a covered transaction with a person who is—

(1) Debarred or suspended;

(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (See appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

[60 FR 33041, 33045, June 26, 1995]

Subpart C—Debarment

§ 513.300 General.

The debarring official may debar a person for any of the causes in § 513.30, using procedures established in §§ 513.310 through 513.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 513.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 513.300 through 513.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a

public or private agreement or transaction;

(2) Violation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 513.215 or § 513.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

Broadcasting Board of Governors

§513.314

(4) Violation of a material provision of a voluntary exclusion agreement entered into under §513.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in §513.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[53 FR 19179, 19204, May 26, 1988, as amended at 54 FR 4950, 4955, Jan. 31, 1989]

§513.310 Procedures.

Broadcasting Board of Governors shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§513.311 through 513.314.

§513.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§513.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under §513.305 for proposing debarment;

(d) Of the provisions of §513.311 through §513.314, and any other Broadcasting Board of Governors procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

§513.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of pro-

posed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§513.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of

§513.315

22 CFR Ch. V (4–1–05 Edition)

the proceedings with respect to disputed facts.

(c)(1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in §513.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§513.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, Broadcasting Board of Governors may, at any time, settle a debarment or suspension action.

(b) If a participant and the Board agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see subpart E).

§513.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part

generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of subpart F of this part (see 513.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§513.311 through 513.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

[53 FR 19179, 19204, May 26, 1988, as amended at 54 FR 4950, 4955, Jan. 31, 1989]

§513.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and

Broadcasting Board of Governors

§513.411

an opportunity to respond (see §§513.311 through 513.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D—Suspension

§513.400 General.

(a) The suspending official may suspend a person for any of the causes in §513.405 using procedures established in §§513.410 through 513.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in §513.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the Board should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§513.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§513.400 through 513.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in §513.305(a); or

(2) That a cause for debarment under §513.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§513.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* Broadcasting Board of Governors shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §513.411 through §513.413.

§513.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously

§ 513.412

reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 513.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of § 513.411 through § 513.413 and any other Broadcasting Board of Governors procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§ 513.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the Board presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the Board, by mutual agreement, waive the requirement for a transcript.

22 CFR Ch. V (4–1–05 Edition)

§ 513.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 513.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 513.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion

Broadcasting Board of Governors

§513.510

of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§513.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see §513.325), except that the procedures of §§513.410 through 513.413 shall be used in imposing a suspension.

Subpart E—Responsibilities of GSA, Board and Participants

§513.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§513.505 Broadcasting Board of Governors responsibilities.

(a) The Board shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the Board shall also provide GSA and OMB with information concerning all transactions in which Broadcasting Board of Governors has granted exceptions under §513.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the Board shall advise GSA of the information set forth in §513.500(b) and of the exceptions granted under §513.215 within five working days after taking such actions.

(c) The Board shall direct inquiries concerning listed persons to the agency that took the action.

(d) Board officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Board officials shall check the Nonprocurement List before approving principals or lower tier participants where Board approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§513.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In

addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to Broadcasting Board of Governors if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 55 FR 21688, 21694, May 25, 1990, unless otherwise noted.

§ 513.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the Board that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the Board that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the Board are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 513.605 Definitions.

(a) Except as amended in this section, the definitions of § 513.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the

Broadcasting Board of Governors

§513.615

grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the in-

strumentality to be an agency of the State government.

§513.610 Coverage.

(a) This subpart applies to any grantee of the Board.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the Board head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§513.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the Board head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under §513.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to appendix C); or

§ 513.620

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 513.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 513.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 513.320(a)(2) of this part).

§ 513.625 Exception provision.

The Board head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the Board head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 513.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required

22 CFR Ch. V (4-1-05 Edition)

certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but

in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 513.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the re-

ceipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(Approved by the Office of Management and Budget under control number 0991-0002)

APPENDIX A TO PART 513—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or Board's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or Board determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or Board may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or Board to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction*, *debarred*, *suspended*, *ineligible*, *lower tier covered transaction*, *participant*, *person*, *primary covered transaction*, *principal*, *proposal*, and *voluntarily excluded*, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or Board to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter

into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or Board entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or Board entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or Board may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or Board;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33045, June 26, 1995]

APPENDIX B TO PART 513—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government the department or Board with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms *covered transaction*, *debarred*, *suspended*, *ineligible*, *lower tier covered transaction*, *participant*, *person*, *primary covered transaction*, *principal*, *proposal*, and *voluntarily excluded*, as used in this clause, have the meaning set out in the Definitions and

Broadcasting Board of Governors

Pt. 513, App. C

Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or Board with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or Board with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33045, June 26, 1995]

APPENDIX C TO PART 513—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the Board awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the Board, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the Board changes during the performance of the grant, the grantee shall inform the Board of the

change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All *direct charge* employees; (ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces.

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the Board in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution,

Broadcasting Board of Governors

§ 518.1

dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690, 21694, May 25, 1990]

PART 518—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

Subpart A—General

Sec.

- 518.1 Purpose.
- 518.2 Definitions.
- 518.3 Effect on other issuances.
- 518.4 Deviations.
- 518.5 Subawards.

Subpart B—Pre-Award Requirements

- 518.10 Purpose.
- 518.11 Pre-award policies.
- 518.12 Forms for applying for Federal assistance.
- 518.13 Debarment and suspension.
- 518.14 Special award conditions.
- 518.15 Metric system of measurement.
- 518.16 Resource Conservation and Recovery Act.
- 518.17 Certifications and representations.

Subpart C—Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

- 518.20 Purpose of financial and program management.
- 518.21 Standards for financial management systems.
- 518.22 Payment.
- 518.23 Cost sharing or matching.
- 518.24 Program income.
- 518.25 Revision of budget and program plans.
- 518.26 Non-Federal audits.
- 518.27 Allowable costs.
- 518.28 Period of availability of funds.

PROPERTY STANDARDS

- 518.30 Purpose of property standards.
- 518.31 Insurance coverage.

- 518.32 Real property.
- 518.33 Federally-owned and exempt property.
- 518.34 Equipment.
- 518.35 Supplies and other expendable property.
- 518.36 Intangible property.
- 518.37 Property trust relationship.

PROCUREMENT STANDARDS

- 518.40 Purpose of procurement standards.
- 518.41 Recipient responsibilities.
- 518.42 Codes of conduct.
- 518.43 Competition.
- 518.44 Procurement procedures.
- 518.45 Cost and price analysis.
- 518.46 Procurement records.
- 518.47 Contract administration.
- 518.48 Contract provisions.

REPORTS AND RECORDS

- 518.50 Purpose of reports and records.
- 518.51 Monitoring and reporting program performance.
- 518.52 Financial reporting.
- 518.53 Retention and access requirements for records.

TERMINATION AND ENFORCEMENT

- 518.60 Purpose of termination and enforcement.
- 518.61 Termination.
- 518.62 Enforcement.

Subpart D—After-the-Award Requirements

- 518.70 Purpose.
- 518.71 Closeout procedures.
- 518.72 Subsequent adjustments and continuing responsibilities.
- 518.73 Collection of amounts due.

APPENDIX A TO PART 518—CONTRACT PROVISIONS

AUTHORITY: 22 U.S.C. 2658; 31 U.S.C. 503 and 1111; Reorganization Plan No. 2 of 1977, 42 FR 62461, 3 CFR, 1977 Comp. p. 200; E.O. 12048, 43 FR 13361, 3 CFR, 1978 Comp. p. 168.

SOURCE: 59 FR 39440, Aug. 3, 1994, unless otherwise noted.

Subpart A—General

§ 518.1 Purpose.

This part establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. Federal awarding agencies shall not impose additional or inconsistent requirements, except as provided in §§ 518.4 and 518.14 or unless specifically

required by Federal statute or executive order. Non-profit organizations that implement Federal programs for the States are also subject to State requirements.

§518.2 Definitions.

(a) *Accrued expenditures* means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and,

(3) Other amounts becoming owed under programs for which no current services or performance is required.

(b) *Accrued income* means the sum of:

(1) Earnings during a given period from:

(i) Services performed by the recipient, and

(ii) Goods and other tangible property delivered to purchasers; and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

(c) *Acquisition cost of equipment* means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(d) *Advance* means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

(e) *Award* means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: technical assistance, which provides services instead of

money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

(f) *Cash contributions* means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

(g) *Closeout* means the process by which a Federal awarding agency determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Federal awarding agency.

(h) *Contract* means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

(i) *Cost sharing or matching* means that portion of project or program costs not borne by the Federal Government.

(j) *Date of completion* means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

(k) *Disallowed costs* means those charges to an award that the Federal awarding agency determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

(l) *Equipment* means tangible non-expendable personal property including exempt property charged directly to the award having a useful life or more than one year and an acquisition cost of \$5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

(m) *Excess property* means property under the control of any Federal awarding agency that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

(n) *Exempt property* means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient

without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution or higher education or non-profit organization whose principal purpose is conducting scientific research.

(o) *Federal awarding agency* means the Federal agency that provides an award to the recipient.

(p) *Federal funds authorized* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

(q) *Federal share* of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

(r) *Funding period* means the period of time when Federal funding is available for obligation by the recipient.

(s) *Intangible property and debt instruments* means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

(t) *Obligations* means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

(u) *Outlays or expenditures* means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash dis-

bursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

(v) *Personal property* means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

(w) *Prior approval* means written approval by an authorized official evidencing prior consent.

(x) *Program income* means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §§ 518.24 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

(y) *Project costs* means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

(z) *Project period* means the period established in the award document during which Federal sponsorship begins and ends.

(aa) *Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

(bb) *Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

(cc) *Recipient* means an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Federal awarding agency. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

(dd) *Research and development* means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. "Research" is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. "Development" is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(ee) *Small awards* means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently \$25,000).

(ff) *Subaward* means an award of financial assistance in the form of

money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of "award" in paragraph (e) of this section.

(gg) *Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Federal awarding agency.

(hh) *Supplies* means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(ii) *Suspension* means an action by a Federal awarding agency that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under Federal agency regulations implementing E.O.'s 12549 and 12689, "Debarment and Suspension."

(jj) *Termination* means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

(kk) *Third party in-kind contributions* means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting

Broadcasting Board of Governors

§ 518.11

and specifically identifiable to the project or program.

(ll) *Unliquidated obligations*, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

(mm) *Unobligated balance* means the portion of the funds authorized by the Federal awarding agency that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(nn) *Unrecovered indirect cost* means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

(oo) *Working capital advance* means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 518.3 Effect on other issuances.

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks and other non-regulatory materials which are inconsistent with the requirements of this part shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 518.4.

§ 518.4 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this part shall be permitted only in unusual circumstances. Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB. Federal awarding agencies may apply less restrictive requirements when awarding small awards, except for those requirements which are stat-

utory. Exceptions on a case-by-case basis may also be made by Federal awarding agencies.

§ 518.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals or other non-profit organizations. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," published at 53 FR 9034 (3/11/88).

Subpart B—Pre-Award Requirements

§ 518.10 Purpose.

Sections 518.11 through 518.17 prescribes forms and instructions and other pre-award matters to be used in applying for Federal awards.

§ 518.11 Pre-award policies.

(a) Use of Grants and Cooperative Agreements, and Contracts. In each instance, the Federal awarding agency shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

§ 518.12

(b) Public Notice and Priority Setting. Federal awarding agencies shall notify the public of its intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 518.12 Forms for applying for Federal assistance.

(a) Federal awarding agencies shall comply with the applicable report clearance requirements of 5 CFR part 1320, "Controlling Paperwork Burdens on the Public," with regard to all forms used by the Federal awarding agency in place of or as a supplement to the Standard Form 424 (SF-424) series.

(b) Applicants shall use the SF-424 series or those forms and instructions prescribed by the Federal awarding agency.

(c) For Federal programs covered by E.O. 12372, "Intergovernmental Review of Federal Programs," the applicant shall complete the appropriate sections of the SF-424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Federal awarding agency or the *Catalog of Federal Domestic Assistance*. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) Federal awarding agencies that do not use the SF-424 form should indicate whether the application is subject to review by the State under E.O. 12372.

§ 518.13 Debarment and suspension.

Federal awarding agencies and recipients shall comply with the non-procurement debarment and suspension rule, implementing E.O.'s 12549 and 12689, "Debarment and Suspension." This rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

22 CFR Ch. V (4-1-05 Edition)

§ 518.14 Special award conditions.

(a) Federal awarding agencies may impose additional requirements as needed, if an applicant or recipient:

(1) Has a history of poor performance,

(2) Is not financially stable,

(3) Has a management system that does not meet the standards prescribed in this part,

(4) Has not conformed to the terms and conditions of a previous award, or

(5) Is not otherwise responsible.

(b) Additional requirements may only be imposed provided that such applicant or recipient is notified in writing as to:

(1) The nature of the additional requirements,

(2) The reason why the additional requirements are being imposed,

(3) The nature of the corrective action needed,

(4) The time allowed for completing the corrective actions, and

(5) The method for requesting reconsideration of the additional requirements imposed.

§ 518.15 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205), declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. Federal awarding agencies shall follow the provisions of E.O. 12770, "Metric Usage in Federal Government Programs."

§ 518.16 Resource Conservation and Recovery Act.

Under the Act, any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with section

Broadcasting Board of Governors

§ 518.21

6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR Parts 247-254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 518.17 Certification and representations.

Unless prohibited by statute or codified regulation, each Federal awarding agency is authorized and encouraged to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

Subpart C—Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

§ 518.20 Purpose of financial and program management.

Sections 518.21 through 518.28 prescribe standards for financial management systems, methods for making payments and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 518.21 Standards for financial management systems.

(a) Federal awarding agencies shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 19.52. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101-453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, "Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

§ 518.22

22 CFR Ch. V (4–1–05 Edition)

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Federal awarding agency may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, "Surety Companies Doing Business with the United States."

§ 518.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b)(1) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(i) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(ii) Financial management systems that meet the standards for fund control and accountability as established in section § 518.21.

(2) Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the Federal awarding agency to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF-270, "Request for Advance or Reimbursement," or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special Federal awarding agency instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) cannot be met. Federal awarding agencies may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the Federal awarding agency shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients shall be authorized to submit request for reimbursement at least monthly when electronic funds are not used.

(f) If a recipient cannot meet the criteria for advance payments and the Federal awarding agency has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Federal awarding agency may provide cash on a working capital advance basis. Under this procedure, the Federal awarding

Broadcasting Board of Governors

§ 518.22

agency shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Federal awarding agency shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, Federal awarding agencies shall not withhold payments for proper charges made by recipients at any time during the project period unless the conditions in paragraphs (h)(1) or (2) of this section apply.

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements.

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A-129, "Managing Federal Credit Programs." Under such conditions, the Federal awarding agency may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows:

(1) Except for situations described in paragraph (i)(2) of this section, Federal awarding agencies shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless the conditions in paragraphs (k)(1), (2) or (3) of this section apply.

(1) The recipient receives less than \$120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to \$250 per year may be retained by the recipient for administrative expense. In keeping with Electric Funds Transfer rules, (31 CFR part 206), interest should be remitted to the HHS Payment Management System through an electric medium such as the FEDWIRE Deposit system. Recipients which do not have this capability should use a check. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this part, only the following forms shall be

authorized for the recipients in requesting advances and reimbursements. Federal agencies shall not require more than an original and two copies of these forms.

(1) SF-270, Request for Advance or Reimbursement. Each Federal awarding agency shall adopt the SF-270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. Federal awarding agencies, however, have the option of using this form for construction programs in lieu of the SF-271, "Outlay Report and Request for Reimbursement for Construction Programs."

(2) SF-271, Outlay Report and Request for Reimbursement for Construction Programs. Each Federal awarding agency shall adopt the SF-271 as the standard form to be used for requesting reimbursement for construction programs. However, a Federal awarding agency may substitute the SF-270 when the Federal awarding agency determines that it provides adequate information to meet Federal needs.

§518.23 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the Federal awarding agency.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a Federal awarding agency authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of paragraph (c) (1) or (2) of this section.

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not

Broadcasting Board of Governors

§ 518.24

exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if the conditions in paragraphs (g)(1) or (2) of this section apply.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§ 518.24 Program income.

(a) Federal awarding agencies shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with Federal awarding agency regulations or the terms and conditions of the award, shall be used in one or more of the ways listed in the following.

(1) Added to funds committed to the project by the Federal awarding agency and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When an agency authorizes the disposition of program income as described in paragraphs (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) In the event that the Federal awarding agency does not specify in its regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the awarding agency indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in § 518.14.

(e) Unless Federal awarding agency regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to

§ 518.25

22 CFR Ch. V (4–1–05 Edition)

the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by Federal awarding agency regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§ 518.30 through 518.37).

(h) Unless Federal awarding agency regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 518.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon Federal awarding agency requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in

time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A-21, "Cost Principles for Institutions of Higher Education," OMB Circular A-122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74 Appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, Federal awarding agencies are authorized, at their option, to waive cost-related and administrative prior written approvals required by this part and OMB Circulars A-21 and A-122. Such waivers may include authorizing recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Federal awarding agency. All pre-award costs are incurred at the recipient's risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive an award

Broadcasting Board of Governors

§ 518.26

or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances.

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Federal awarding agency provides otherwise in the award or in the agency's regulations, the prior approval requirements described in paragraph (e) of this section are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) of this section applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. No Federal awarding agency shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from Federal awarding agencies for budget revisions whether

the conditions in paragraphs (h) (1), (2) or (3) of this section apply.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 518.27

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When a Federal awarding agency makes an award that provides support for both construction and nonconstruction work, the Federal awarding agency may require the recipient to request prior approval from the Federal awarding agency before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, Federal awarding agencies shall require recipients to notify the Federal awarding agency in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than \$5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Federal awarding agency indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, Federal awarding agencies shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 518.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or

§ 518.27

other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A-133 shall be subject to the audit requirements of the Federal awarding agencies.

(d) Commercial organizations shall be subject to the audit requirements of the Federal awarding agency or the prime recipients as incorporated into the award document.

[59 FR 39440, Aug. 3, 1994, as amended at 62 FR 45939, 45941, Aug. 29, 1997]

§ 518.27 Allowable costs.

For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A-87, "Cost Principles for State and Local Governments." The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A-122, "Cost Principles for Non-Profit Organizations." The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A-21, "Cost Principles for Educational Institutions." The allowability of costs incurred by hospitals is determined in accordance with the provisions of Appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals." The allowability of costs incurred by commercial organizations

22 CFR Ch. V (4-1-05 Edition)

and those non-profit organizations listed in Attachment C to Circular A-122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

§ 518.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Federal awarding agency.

PROPERTY STANDARDS

§ 518.30 Purpose of property standards.

(a) Sections 518.31 through 518.37 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. Federal awarding agencies shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 518.31 through 518.37.

§ 518.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 518.32 Real property.

Each Federal awarding agency shall prescribe requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and

Broadcasting Board of Governors

§ 518.34

shall not encumber the property without approval of the Federal awarding agency.

(b) The recipient shall obtain written approval by the Federal awarding agency for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by the Federal awarding agencies.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the Federal awarding agency or its successor Federal awarding agency. The Federal awarding agency shall observe one or more of the following disposition instructions.

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Federal awarding agency and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 518.33 Federally-owned and exempt property.

(a) Federally-owned property. (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to the Federal awarding agency. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Federal awarding agency for further Federal agency utilization.

(2) If the Federal awarding agency has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710(I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, "Improving Mathematics and Science Education in Support of the National Education Goals.") Appropriate instructions shall be issued to the recipient by the Federal awarding agency.

(b) Exempt property. When statutory authority exists, the Federal awarding agency has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Federal awarding agency considers appropriate. Such property is "exempt property." Should a Federal awarding agency not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 518.34 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long

as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order or priority:

(1) Activities sponsored by the Federal awarding agency which funded the original project, then

(2) Activities sponsored by other Federal awarding agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Federal awarding agency.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal awarding agency for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Federal awarding agency.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the

Broadcasting Board of Governors

§ 518.35

extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of \$5,000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Federal awarding agency. The Federal awarding agency shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within that agency, the availability of the equipment shall be reported to the General Services Administration by the Federal awarding agency to determine whether a requirement for the equipment exists in other Federal agencies. The Federal awarding agency shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern.

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the Federal awarding agency an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share \$500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable

shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by the Federal awarding agency for such costs incurred in its disposition.

(4) The Federal awarding agency may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards.

(i) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(ii) The Federal awarding agency shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with grant funds and federally-owned equipment. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(iii) When the Federal awarding agency exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 518.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding \$5000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either cases, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than

§ 518.36

private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 518.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Federal awarding agency(ies) reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, "Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."

(c) Unless waived by the Federal awarding agency, the Federal Government has the right to the following:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award.

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of paragraph § 19.34(g).

§ 518.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to record liens or other appropriate no-

22 CFR Ch. V (4-1-05 Edition)

tices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

PROCUREMENT STANDARDS

§ 518.40 Purpose of procurement standards.

Sections 518.41 through 518.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by the Federal awarding agencies upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 518.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the Federal awarding agency, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 518.42 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent,

Broadcasting Board of Governors

§ 518.44

any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 518.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 518.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that the conditions in paragraphs (a)(1), (2) and (3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms or functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipient to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange timeframes for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger

§ 518.45

contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use of services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms, and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by the implementation of E.O.'s 12549 and 12689, "Debarment and Suspension."

(e) Recipients shall, on request, make available for the Federal awarding agency, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently \$25,000) and is to be awarded without

22 CFR Ch. V (4-1-05 Edition)

competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 518.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 518.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

- (a) Basis for contractor selection,
- (b) Justification for lack of competition when competitive bids or offers are not obtained, and
- (c) Basis for award cost or price.

§ 518.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions, and specifications of the contract.

§ 518.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and

Broadcasting Board of Governors

§ 518.51

complete agreement, the following provisions in all contracts. The following provisions shall also be applied to sub-contracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, the Federal awarding agency may accept the bonding policy and requirements of the recipient, provided the Federal awarding agency has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a

contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, the Federal awarding agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable.

REPORTS AND RECORDS

§ 518.50 Purpose of reports and records.

Sections 518.51 through 518.53 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 518.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure sub-recipients have met the audit requirements as delineated in § 518.26.

§ 518.52

22 CFR Ch. V (4–1–05 Edition)

(b) The Federal awarding agency shall prescribe the frequency with which the performance reports shall be submitted. Except as provided in § 518.51(f), performance reports shall not be required more frequently than quarterly or, less frequently than annually. Annual reports shall be due 90 calendar days after the grant year; quarterly or semi-annual reports shall be due 30 days after the reporting period. The Federal awarding agency may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following.

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Federal awarding agency of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) Federal awarding agencies may make site visits, as needed.

(h) Federal awarding agencies shall comply with clearance requirements of

5 CFR part 1320 when requesting performance data from recipients.

§ 518.52 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) SF-269 or SF-269A, Financial Status Report.

(i) Each Federal awarding agency shall require recipients to use the SF-269 or SF-269A to report the status of funds for all nonconstruction projects or programs. A Federal awarding agency may, however, have the option of not requiring the SF-269 or SF-269A when the SF-270, Request for Advance or Reimbursement, or SF-272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF-269 or SF-269A shall be required at the completion of the project when the SF-270 is used only for advances.

(ii) The Federal awarding agency shall prescribe whether the report shall be on a cash or accrual basis. If the Federal awarding agency requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The Federal awarding agency shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) The Federal awarding agency shall require recipients to submit the SF-269 or SF-269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the Federal awarding agency upon request of the recipient.

Broadcasting Board of Governors

§ 518.53

(2) SF-272, Report of Federal Cash Transactions.

(i) When funds are advanced to recipients the Federal awarding agency shall require each recipient to submit the SF-272 and, when necessary, its continuation sheet, SF-272a. The Federal awarding agency shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) Federal awarding agencies may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, Federal awarding agencies may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF-272 15 calendar days following the end of each quarter. The Federal awarding agencies may require a monthly report from those recipients receiving advances totaling \$1 million or more per year.

(v) Federal awarding agencies may waive the requirement for submission of the SF-272 for any one of the following reasons:

(A) When monthly advances do not exceed \$25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the Federal awarding agency's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or,

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Federal awarding agency needs additional information or more frequent reports, the following shall be observed.

(1) When additional information is needed to comply with legislative requirements, Federal awarding agencies shall issue instructions to require recipients to submit such information under the "Remarks" section of the reports.

(2) When a Federal awarding agency determines that a recipient's accounting system does not meet the standards in § 518.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. The Federal awarding agency, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) Federal awarding agencies are encouraged to shade out any line item on any report if not necessary.

(4) Federal awarding agencies may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) Federal awarding agencies may provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

§ 518.53 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. Federal awarding agencies shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by the Federal awarding agency. The only exceptions are the following.

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the Federal awarding agency, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in paragraph § 518.53(g).

(c) Copies of original records may be substituted for the original records if authorized by the Federal awarding agency.

(d) The Federal awarding agency shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a Federal awarding agency may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Federal awarding agency, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no Federal awarding agency shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Federal awarding agency can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the Federal awarding agency.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost alloca-

tion plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to the Federal awarding agency or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the Federal awarding agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

TERMINATION AND ENFORCEMENT

§ 518.60 Purpose of termination and enforcement.

Sections 518.61 and 518.62 set forth uniform suspension, termination and enforcement procedures.

§ 518.61 Termination.

(a) Awards may be terminated in whole or in part only if the conditions in paragraphs (a)(1), (2) or (3) of this section apply.

(1) By the Federal awarding agency, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the Federal awarding agency with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the Federal awarding agency written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated.

Broadcasting Board of Governors

§ 518.71

However, if the Federal awarding agency determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraphs (a)(1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 518.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 518.62 Enforcement.

(a) Remedies for noncompliance. If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Federal awarding agency may, in addition to imposing any of the special conditions outlined in § 518.14, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the Federal awarding agency.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Without further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) Hearings and appeals. In taking an enforcement action, the awarding agency shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) Effects of suspension and termination. Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the awarding agency ex-

pressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if the conditions in paragraphs (c) (1) or (2) of this section apply.

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) Relationship to debarment and suspension. The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under E.O.s 12549 and 12689 and the Federal awarding agency implementing regulations (see § 518.13).

Subpart D—After-the-Award Requirements

§ 518.70 Purpose.

Sections 518.71 through 518.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 518.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Federal awarding agency may approve extensions when requested by the recipient.

(b) Unless the Federal awarding agency authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

§518.72

(c) The Federal awarding agency shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the Federal awarding agency has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A-129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Federal awarding agency shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§518.31 through 518.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, the Federal awarding agency shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowing costs resulting from the final audit.

§518.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of the Federal awarding agency to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in §518.26.

(4) Property management requirements in §§518.31 through 518.37.

(5) Records retention as required in §518.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Federal awarding agency and the recipient, provided the responsibilities of the recipient referred to in §518.73(a), including those for property management as applicable, are considered and provi-

22 CFR Ch. V (4-1-05 Edition)

sions made for continuing responsibilities of the recipient, as appropriate.

§518.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Federal awarding agency may reduce the debt by the provisions of paragraphs (a) (1), (2) or (3) of this section.

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking over action permitted by statute.

(b) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR chapter II, "Federal Claims Collection Standards."

APPENDIX A TO PART 518—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. *Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of \$2,000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise

entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than \$2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction”). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333)*—Where applicable, all contracts awarded by recipients in excess of \$2,000 for construction contracts and in excess of \$2,500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the right of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative

Agreements,” and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended*—Contracts and subgrants of amounts in excess of \$100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*—No contract shall be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O.s 12549 and 12689, “Debarment and Suspension” and 49 CFR part 29. This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principal employees.

PART 519—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

519.100 Conditions on use of funds.

519.105 Definitions.

519.110 Certification and disclosure.

Subpart B—Activities by Own Employees

519.200 Agency and legislative liaison.

519.205 Professional and technical services.

519.210 Reporting.

§ 519.100

22 CFR Ch. V (4–1–05 Edition)

Subpart C—Activities by Other than Own Employees

519.300 Professional and technical services.

Subpart D—Penalties and Enforcement

519.400 Penalties.

519.405 Penalty procedures.

519.410 Enforcement.

Subpart E—Exemptions

519.500 Secretary of Defense.

Subpart F—Agency Reports

519.600 Semi-annual compilation.

519.605 Inspector General report.

APPENDIX A TO PART 519—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 519—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Public Law 101-121 (31 U.S.C. 1352); 41 U.S.C. 701 *et seq.*

SOURCE: 55 FR 6737, 6750, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§ 519.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 519.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

- (1) The awarding of any Federal contract;
- (2) The making of any Federal grant;
- (3) The making of any Federal loan;
- (4) The entering into of any cooperative agreement; and
- (5) The extension, continuation, renewal, amendment, or modification of

any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local

public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§519.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000,

Unless such person previously filed a certification, and a disclosure form, if

required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding \$100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding \$100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding \$100,000 at any tier under a Federal loan exceeding \$150,000; or,

(4) A contract or subcontract exceeding \$100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification

or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 519.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 519.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 519.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 519.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal

§519.210

by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§519.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

22 CFR Ch. V (4-1-05 Edition)

Subpart C—Activities by Other Than Own Employees

§519.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §519.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §519.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of

Broadcasting Board of Governors

§ 519.500

his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 519.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of \$10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between \$10,000 and \$100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 519.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 519.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 519.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 519.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget

(OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 519.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

Broadcasting Board of Governors

Pt. 519, App. A

APPENDIX A TO PART 519— CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and

contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

APPENDIX B TO PART 519—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIESApproved by OMB
0348-0046Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action: <input type="checkbox"/> a. contract <input type="checkbox"/> b. grant <input type="checkbox"/> c. cooperative agreement <input type="checkbox"/> d. loan <input type="checkbox"/> e. loan guarantee <input type="checkbox"/> f. loan insurance	2. Status of Federal Action: <input type="checkbox"/> a. bid/offer/application <input type="checkbox"/> b. initial award <input type="checkbox"/> c. post-award	3. Report Type: <input type="checkbox"/> a. initial filing <input type="checkbox"/> b. material change For Material Change Only: year _____ quarter _____ date of last report _____
4. Name and Address of Reporting Entity: <input type="checkbox"/> Prime <input type="checkbox"/> Subawardee Tier _____, if known: Congressional District, if known: _____		5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime: Congressional District, if known: _____
6. Federal Department/Agency:	7. Federal Program Name/Description: CFDA Number, if applicable: _____	
8. Federal Action Number, if known:	9. Award Amount, if known: \$ _____	
10. a. Name and Address of Lobbying Entity (if individual, last name, first name, MI): (attach Continuation Sheet(s) SF-LLL-A, if necessary)		b. Individuals Performing Services (including address if different from No. 10a) (last name, first name, MI): (attach Continuation Sheet(s) SF-LLL-A, if necessary)
11. Amount of Payment (check all that apply): \$ _____ <input type="checkbox"/> actual <input type="checkbox"/> planned	13. Type of Payment (check all that apply): <input type="checkbox"/> a. retainer <input type="checkbox"/> b. one-time fee <input type="checkbox"/> c. commission <input type="checkbox"/> d. contingent fee <input type="checkbox"/> e. deferred <input type="checkbox"/> f. other; specify: _____	
12. Form of Payment (check all that apply): <input type="checkbox"/> a. cash <input type="checkbox"/> b. in-kind; specify: nature _____ value _____		
14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11: (attach Continuation Sheet(s) SF-LLL-A, if necessary)		
15. Continuation Sheet(s) SF-LLL-A attached: <input type="checkbox"/> Yes <input type="checkbox"/> No		
16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.		Signature: _____ Print Name: _____ Title: _____ Telephone No.: _____ Date: _____
Federal Use Only:		Authorized for Local Reproduction Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.
(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
 1148-0046

Reporting Entity: _____ Page _____ of _____

Authorized for Local Reproduction
 Standard Form - LLL-A

**PART 521—IMPLEMENTATION OF
 THE PROGRAM FRAUD CIVIL
 REMEDIES ACT**

Sec.

521.1 Basis and purpose.

521.2 Definitions.

521.3 Basis for civil penalties and assessments.

521.4 Investigation.

521.5 Review by the reviewing official.

521.6 Prerequisites for issuing a complaint.

521.7 Complaint.

521.8 Service of complaint.

521.9 Answer.

521.10 Default upon failure to file an answer.

521.11 Referral of complaint and answer to the ALJ.

521.12 Notice of hearing.

521.13 Parties to the hearing.

521.14 Separation of functions.

521.15 Ex Parte contacts.

521.16 Disqualifications of reviewing official or ALJ.

521.17 Rights of parties.

521.18 Authority of the ALJ.

521.19 Prehearing conferences.

521.20 Disclosure of documents.

521.21 Discovery.

521.22 Exchange of witness lists, statements and exhibits.

Broadcasting Board of Governors

§ 521.2

- 521.23 Subpoenas for attendance at hearing.
- 521.24 Protective order.
- 521.25 Fees.
- 521.26 Form, filing and service of papers.
- 521.27 Computation of time.
- 521.28 Motions.
- 521.29 Sanctions.
- 521.30 The hearing and burden of proof.
- 521.31 Determining the amount of penalties and assessments.
- 521.32 Location of hearing.
- 521.33 Witnesses.
- 521.34 Evidence.
- 521.35 The record.
- 521.36 Post-hearing briefs.
- 521.37 Initial decision.
- 521.38 Reconsideration of initial decision.
- 521.39 Appeal to the Broadcasting Board of Governors Director.
- 521.40 Stays ordered by the Department of Justice.
- 521.41 Stay pending appeal.
- 521.42 Judicial review.
- 521.43 Collection of civil penalties and assessments.
- 521.44 Right to administrative offset.
- 521.45 Deposit in Treasury of United States.
- 521.46 Compromise or settlement.
- 521.47 Limitations.

AUTHORITY: 22 U.S.C. 2658; 31 U.S.C. 3801-3812.

SOURCE: 56 FR 25028, June 3, 1991, unless otherwise noted.

§ 521.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Public Law 99-509, sections 6101-6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801-3812. The Act requires each authority head to promulgate regulations necessary to implement the provisions of the statute (31 U.S.C. 3809).

(b) *Purpose.* (1) This part establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Broadcasting Board of Governors or to its agents, and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

(c) *Special considerations abroad.* Where a party, witness or material evidence in a proceeding under these regulations is located abroad, the investigating official, reviewing official or

ALJ, as the case may be, may adjust the provisions below for service, filing of documents, time limitations, and related matters to meet special problems arising out of that location.

§ 521.2 Definitions.

ALJ means an Administrative Law Judge in the Broadcasting Board of Governors appointed pursuant to 5 U.S.C. 3105 or detailed to the Broadcasting Board of Governors pursuant to 5 U.S.C. 3344.

Benefit means, in the context of "statement," anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(1) Made to the Broadcasting Board of Governors for property, services or money (including money representing grants, loans, insurance or benefits);

(2) Made to a recipient of property, services or money from the Broadcasting Board of Governors, or to a party to a contract with the Broadcasting Board of Governors—

(i) For property or services if the United States—

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the Broadcasting Board of Governors which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 521.7.

Defendant means any person alleged in a complaint under § 521.7 to be liable

§ 521.3

22 CFR Ch. V (4–1–05 Edition)

for a civil penalty or assessment under § 521.3.

Director means Director of the Broadcasting Board of Governors.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 521.10 or § 521.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating Official means the Inspector General for the Broadcasting Board of Governors or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Knows or has reason to know means that a person, with respect to a claim or statement—

(1) Has the actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(3) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms *presents*, *submits* and *causes to be made, presented, or submitted*. As the context requires, *making* or *made* shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization and includes the plural of that term.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or the District of Columbia or the Commonwealth of Puerto Rico.

Reviewing official means the General Counsel of the Broadcasting Board of Governors or his designee who is:

BBG means the Broadcasting Board of Governors.

(1) Not subject to supervision by, or required to report to, the investigating official;

(2) Not employed in the organizational unit of the Broadcasting Board of Governors in which the investigating official is employed; and

(3) Is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for)—

(i) A contract with, or a bid or proposal for a contract with; or

(ii) A grant, loan, or benefit from, the Broadcasting Board of Governors, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

BBG means the Broadcasting Board of Governors.

§ 521.3 Basis for civil penalties and assessments.

(a) *Claims*. (1) Any person who makes claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed; shall be subject, in addition to any other remedy that may be prescribed by law,

Broadcasting Board of Governors

§ 521.4

to a civil penalty of not more than \$5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the Broadcasting Board of Governors, a recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Broadcasting Board of Governors or such recipient or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statement.* (1) Any person who makes, a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the Broadcasting Board of Governors when such statement is actually made to an agent, fiscal intermediary, or other entity, including any

State or political subdivision thereof, acting for or on behalf of the Broadcasting Board of Governors.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 521.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued, and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefore, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for

§ 521.5

suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 521.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 521.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 521.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 521.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 521.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 521.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 521.7 only if:

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 521.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted

22 CFR Ch. V (4–1–05 Edition)

at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 521.3(a) does not exceed \$150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person's claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 521.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 521.8.

(b) The complaint shall state:

(1) Allegations of liability against the defendant including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessment without right to appeal, as provided in § 521.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

Broadcasting Board of Governors

§ 521.10

§ 521.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by:

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or the defendant's representative.

(4) In case of service abroad authenticated in accordance with the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters.

§ 521.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for a hearing.

(b) In the answer, the defendant:

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ

the complaint, the general answer denying liability, and the request for an extension of time as provided in § 521.11. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 521.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 521.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 521.8, a notice that an initial decision will be issued under this section.

(c) If the defendant fails to answer, the ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under § 521.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 521.38.

§ 521.11

(h) The defendant may appeal to the Director the decision denying a motion to reopen by filing a notice of appeal with the Director within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the Director decides the issue.

(i) If the defendant files a timely notice of appeal with the Director, the ALJ shall forward the record of the proceeding to the Director.

(j) The Director shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the Director decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the Director shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Director decides that the defendant's failure to file a timely answer is not excused, the Director shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the Director issues such decision.

§ 521.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 521.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 521.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the

22 CFR Ch. V (4-1-05 Edition)

Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 521.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Broadcasting Board of Governors.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 521.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Broadcasting Board of Governors who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the Director, except as a witness or representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to, the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the Broadcasting Board of Governors, including in the offices of either the investigating official or the reviewing official.

§ 521.15 Ex Parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

Broadcasting Board of Governors

§ 521.18

§ 521.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that the reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Director may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 521.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 521.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ may:

(1) Set and change the date, time and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas to be served within the United States requiring the attendance of witnesses and the production of documents at depositions or at hearings. Subpoenas to be served outside the jurisdiction of the United States shall state on their face the authority therefore;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and time of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find treaties and other international agreements or Federal Statutes or regulations invalid.

§ 521.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

- (1) Simplification of the issues;
 - (2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;
 - (3) Stipulations and admissions of fact or as to the contents and authenticity of documents;
 - (4) Whether the parties can agree to submission of the case on a stipulated record;
 - (5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;
 - (6) Limitation of the number of witnesses;
 - (7) Scheduling dates for the exchange of witness lists and of proposed exhibits;
 - (8) Discovery;
 - (9) The time and place for the hearing; and
 - (10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.
- (d) The ALJ shall issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 521.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 521.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the re-

viewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 521.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the document subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 521.9.

§ 521.21 Discovery.

(a) The following types of discovery are authorized:

- (1) Requests for production of documents for inspection and copying;
- (2) Requests for admissions of the authenticity of any relevant document or the truth of any relevant fact;
- (3) Written interrogatories; and
- (4) Depositions.

(b) For the purpose of this section and § 521.22 and § 521.23, the term “documents” includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service a party may file an opposition to the motion and/or a motion for protective order as provided § 521.24.

(3) The ALJ may grant a motion for discovery only if the ALJ finds that the discovery sought:

- (i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

Broadcasting Board of Governors

§ 521.24

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 521.24.

(e) *Deposition.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 521.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 521.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 521.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above, unless the ALJ finds

good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 521.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 521.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 521.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or, with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person

§ 521.25

from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) That the discovery may be had only through a method of discovery other than that requested;
- (4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;
- (5) That discovery be conducted with no one present except persons designated by the ALJ;
- (6) That the contents of discovery or evidence be sealed;
- (7) That a deposition after being sealed be opened only by order of the ALJ;
- (8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding or other administrative investigation not be disclosed or be disclosed only in a designated way; or
- (9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 521.25 Fees.

The party requesting a subpoena shall pay the cost of the fee and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in the United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the Broadcasting Board of Governors, a check for witness fees and mileage need not accompany the subpoena.

§ 521.26 Form, filing and service of papers.

- (a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.
- (2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena), and shall be in

22 CFR Ch. V (4–1–05 Edition)

English or accompanied by an English translation.

- (3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

- (4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 521.8, shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 521.27 Computation of time.

(a) In computing any period of time under this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

Broadcasting Board of Governors

§ 521.31

§ 521.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 521.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for:

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing

evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 521.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 521.3, and if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Broadcasting Board of Governors shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 521.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Director, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that

§ 521.32

22 CFR Ch. V (4–1–05 Edition)

may influence the ALJ and the Director in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees of agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding, to have engaged

in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the Director from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 521.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present arguments with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 521.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 521.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

Broadcasting Board of Governors

§ 521.37

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 521.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence, where appropriate (e.g., to exclude unreliable evidence).

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by consideration of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 521.24.

§ 521.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Director.

(c) The record of the hearing may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 521.24.

§ 521.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing briefs, at a time not exceeding 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 521.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

§ 521.38

22 CFR Ch. V (4–1–05 Edition)

(1) Whether the claims or statements identified in the complaint, or any portion thereof, violate § 521.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 521.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Director. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the Director, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Director and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 521.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the Director and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the Director in accordance with § 521.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the Director and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Director in accordance with § 521.39.

§ 521.39 Appeal to the Broadcasting Board of Governors Director.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the Broadcasting Board of Governors Director by filing a notice of appeal with the Broadcasting Board of Governors Director in accordance with this section.

(b)(1) No notice of appeal may be filed until the time period for filing a motion for reconsideration under § 521.38 has expired.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ issues the initial decision.

(4) The Director may extend the initial 30-day period for an additional 30 days if the defendant files with the Director a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Director, and the time for filing motions for reconsideration under § 521.38 has expired, the ALJ shall forward the record of the proceeding to the Director.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decisions and reasons supporting the exceptions.

Broadcasting Board of Governors

§ 521.46

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Director.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Director shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Director that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Director shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The Director may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in an initial decision.

(k) The Director shall promptly serve each party to the appeal with a copy of her/his decision and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Director serves the defendant with a copy of her/his decision, a determination that a defendant is liable under § 521.3 is final and is not subject to judicial review.

§ 521.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Director a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Director shall stay the process immediately. The Director may order the process re-

sumed only upon receipt of the written authorization of the Attorney General.

§ 521.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Director.

(b) No administrative stay is available following a final decision of the Director.

§ 521.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Director imposing penalties or assessments under this part and specifies the procedures for such.

§ 521.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 521.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 521.42 or § 521.43, or any amount agreed upon in a compromise or settlement under § 521.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under the subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 521.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 521.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any

§ 521.47

time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The Director has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during pendency of any review under § 521.42 or during the pendency of any action to collect penalties and assessments under § 521.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 521.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the Director, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Director, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 521.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 521.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 521.10(b) shall be deemed notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 530—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE BROADCASTING BOARD OF GOVERNORS

Sec.

530.101 Purpose.

530.102 Application.

530.103 Definitions.

530.104–530.109 [Reserved]

530.110 Self-evaluation.

530.111 Notice.

530.112–530.129 [Reserved]

530.130 General prohibitions against discrimination.

530.131–530.139 [Reserved]

530.140 Employment.

22 CFR Ch. V (4–1–05 Edition)

530.141–530.148 [Reserved]

530.149 Program accessibility: Discrimination prohibited.

530.150 Program accessibility: Existing facilities.

530.151 Program accessibility: New construction and alterations.

530.152–530.159 [Reserved]

530.160 Communications.

530.161–530.169 [Reserved]

530.170 Compliance procedures.

530.171–530.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 22890, 22896, June 23, 1986, unless otherwise noted.

§ 530.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 530.102 Application.

This part applies to all programs or activities conducted by the Board.

§ 530.103 Definitions.

For purposes of this part, the term—
Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Board. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes

the Board's alleged discriminatory action in sufficient detail to inform the Board of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Board as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Board as having such an impairment.

Historic preservation programs means programs conducted by the Board that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Qualified handicapped person means—

(1) With respect to preschool, elementary, or secondary education services provided by the Board, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or Board policy to receive education services from the Board.

(2) With respect to any other Board program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Board can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 530.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation,

Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 530.104–530.109 [Reserved]

§ 530.110 Self-evaluation.

(a) The Board shall, by August 24, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the Board shall proceed to make the necessary modifications.

(b) The Board shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Board shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 530.111 Notice.

The Board shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Board, and make such information available to them in such manner as the head of the Board finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 530.112–530.129 [Reserved]

§ 530.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Board.

(b)(1) The Board, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Board may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Board may not, directly or through contractual or other

Broadcasting Board of Governors

§ 530.150

arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The Board may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Board; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The Board, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The Board may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the Board establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Board are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The Board shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 530.131–530.139 [Reserved]

§ 530.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Board. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 530.141–530.148 [Reserved]

§ 530.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 530.150, no qualified handicapped person shall, because the Board's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Board.

§ 530.150 Program accessibility: Existing facilities.

(a) *General.* The Board shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the Board to make each of its existing facilities accessible to and usable by handicapped persons;

(2) In the case of historic preservation programs, require the Board to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the Board to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Board personnel believe that the proposed action would fundamentally alter the program or activity or would

result in undue financial and administrative burdens, the Board has the burden of proving that compliance with § 530.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Board head or his or her designee after considering all Board resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the Board shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General*. The Board may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The Board is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The Board, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Board shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) *Historic preservation programs*. In meeting the requirements of § 530.150(a) in historic preservation programs, the Board shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property

is not required because of § 530.150(a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance*. The Board shall comply with the obligations established under this section by October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Board shall develop, by February 23, 1987, a transition plan setting forth the steps necessary to complete such changes. The Board shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the Board's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 530.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Board shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 530.152-530.159 [Reserved]**§ 530.160 Communications.**

(a) The Board shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The Board shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Board.

(i) In determining what type of auxiliary aid is necessary, the Board shall give primary consideration to the requests of the handicapped person.

(ii) The Board need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the Board communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf person (TDD's) or equally effective telecommunication systems shall be used.

(b) The Board shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Board shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Board to take any action that it can demonstrate would result in a funda-

mental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Board personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Board has the burden of proving that compliance with § 530.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Board head or his or her designee after considering all Board resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the Board shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 530.161-530.169 [Reserved]**§ 530.170 Compliance procedures.**

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Board.

(b) The Board shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Director, Office of Equal Employment Opportunity and Civil Rights, shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Office of Equal Employment Opportunity and Civil Rights, Broadcasting Board of Governors, 301 4th Street NW., Washington, DC 20547.

(d) The Board shall accept and investigate all complete complaints for which it has jurisdiction. All complete

complaints must be filed within 180 days of the alleged act of discrimination. The Board may extend this time period for good cause.

(e) If the Board receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Board shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Board shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the Board of the letter required by § 530.170(g). The Board may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the Board.

(j) The head of the Board shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the Board determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The Board may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 22890, 22896, June 23, 1986, as amended at 51 FR 22890, June 23, 1986]

§§ 530.171–530.999 [Reserved]